2248

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 244.

THOMAS E. KEPNER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED MARCH 23, 1903.

(18,875.)

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1 Supreme Court of the United States, October Term, 1902.

THOMAS E. KEPNER, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In error to the supreme court of the Philippine islands.

Proceedings Had in the Court of First Instance of the City of Manila and the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
THOMAS E. KEPNER.

Be it remembered that heretofore, to-wit, on the 28th day of October, A. D., 1901, in the court of first instance of the city of Manila, part II, came W. H. Bishop, prosecuting attorney of the city of Manila, P. I., and filed in the clerk's office of said court an information signed and sworn to by one Aun-Tan, against Thomas E. Kepner, which said information is in the words and figures following, to-wit:

2 *Complaint or Information.*

THE UNITED STATES
versus
THOMAS E. KEPNER.

In the Court of First Instance of the City of Manila, P. I., the 28th Day of October, 1901.

The undersigned accuses Thomas E. Kepner of the crime of swindling committed as follows:

That the said Thomas E. Kepner is now and during all times herein mentioned was an attorney-at-law duly admitted to practice his profession in the city of Manila, P. I., and that then and there, by virtue of his said office of attorney-at-law, he was designated and appointed on the 1st day of April, 1901, by one Aun-Tan as his lawyer in a certain criminal case and all matters incident thereto, pending before the military commission in said city, in which The United States was complainant and the said Aun-Tan and one Wong-Chong were defendants, and that thereafter, to-wit, the 21st day of September, 1901, Thomas E. Kepner assumed the possession and control, as attorney appointed as aforesaid, for the use and benefit of the said Aun-Tan, of a certain warrant which with all the endorsements is hereto attached and marked Exhibit "A" as a part hereof; said warrant being of the value of one thousand dollars

and the personal property of said Aun-Tan; and that thereafter, o
the 23rd day of September, 1901, the said Thomas E. Kepner wit
out the knowledge or consent of the said Aun Tan endorsed sa
warrant as follows: "Aun-Tan, by Thomas E. Kepner, his attorne
Thomas E. Kepner," and having endorsed said warrant as abo
stated without the knowledge or consent of said Aun-Ta
3 then and there presented the same to the Chartered Bank
India Australia and China for payment then and the
whereby he received the sum of one thousand dollars, gold, and t
said Thomas E. Kepner, in the city of Manila, P. I., the 23rd day
September, 1901, willfully, wrongfully, wickedly and fraudulent
stole, converted, and appropriated to himself the said one thousa
dollars, gold, for his own use without the consent of and to t
prejudice of the said Aun-Tan; contrary to the statute in such ca
made and provided.

his
AUN TAN (Chinese characters).
mark.

Witnessed:
J. McMICKING.

Signed and sworn to before me this 28th day of October, 1901,
Manila, Philippine islands.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila.

Witnesses:

O. C. Hing, No. 19 Magallanes street.
Charley Hung, across the street from the "Manila American."
Yick Gich, No. 79 Nueva street,
Aun Tan, No. 348 Jolo street.
J. H. Curley, office of the civil governor of the Philippines.
Sidney M. Gans, auditor's office, treasury building.

to the foregoing complaint received to-day, October 28th, 1901, wi
the document attached. So certified.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila

Settlement Warrant Attached to Complaint.

The military government of the Philippine archipelago.

$1,000.00, U. S. currency.

No. 65. MANILA, P. I., *September* 20, 1901

To the treasurer of the Philippine archipelago:

Pay to Aun Tan or order one thousand no/100 U. S. currency dollars.

W. H. TAFT,
Civil Governor

Settlement No. 66.
A. L. LAWSHE, *Auditor.*

4 (Endorsements on front of warrant.)

In accordance with law this warrant to be paid in local currency. The Chartered Bank of India, Australia and China, Manila, P. I., will pay this warrant.

(Signed) FRANK A. BRANNAGAN, *Treasurer.*

(Endorsements on back of warrant.)

"Before endorsing read these instructions:" The name of the payee as endorsed must correspond in spelling with that on the face of the warrant. No guarantee of an endorsement, imperfect in itself, can be accepted. If the name of the payee, as written on the face of the warrant, is spelled incorrectly the warrant should be returned to the military governor for correction.

Endorsements by mark (x) must be certified to by two witnesses, giving their place of residence.

Payees and endorsees must endorse by their own hands; officials, officially with full title; firms, the usual firm signature by a member of the firm, not by a clerk or other person for the firm.

Delay in presentation of this warrant for payment should be avoided.

AUN TAN,
By THOMAS E. KEPNER,
His Attorney.
THOMAS E. KEPNER.

Afterwards, to-wit, on the 29th day of October, 1901, the defendant Thomas E. Kepner appeared in the court of first instance, part II, and gave bail for his appearance in said court.

5 Afterwards, to-wit, on the 13th day of November, 1901, the defendant Thomas E. Kepner was arraigned in part I of said court of first instance, before the bar of said court, and pleaded *not guilty*, and the trial of said cause set for the 15th day of November, 1901.

Afterwards, to-wit, on the 15th, 16th and 18th days of November, 1901, said defendant Thomas E. Kepner was tried before the Honorable Fletcher Ladd, one of the judges of the supreme court of the Philippine islands, sitting as judge of said court of first instance, part I, without a jury.

Afterwards, to-wit, on the 18th day of December, 1901, the following decision was rendered by said judge, and filed in the clerk's office:

Decision.

In this case there is evidence tending to show that the money which the respondent is charged with unlawfully converting was in fact appropriated by him under a *bona fide* claim of right, and on

the whole I think this evidence is of sufficient weight to raise a reasonable doubt as to the existence of a fraudulent intent which is an essential element of the offense. I therefore find the respondent not guilty.

Manila, P. I., 18th December, 1901.

(Signed) FLETCHER LADD,
Judge of the Court of First Instance, Manila, Part I.

(Signed) THOMAS E. KEPNER.

Afterwards, to-wit, on the 20th day of December, 1901, came the prosecuting attorney of the city of Manila, and appealed from the judgment, in said cause, finding the defendant not guilty, which said appeal is in the words and figures following, to-wit:

6

THE UNITED STATES
against
THOMAS E. KEPNER. } Notice of Appeal.

In the Court of First Instance of the City of Manila, Philippine Islands, on the 20th Day of December, 1901.

Comes now the prosecuting attorney, for and on behalf of the United States, and appeals from the judgment, in the above entitled action, finding the accused not guilty.

(Signed) W. H. BISHOP,
Prosecuting Attorney for the City of Manila, P. I.

(Endorsed:) Received copy, December 20, 1901. (Signed) Thomas E. Kepner. (Signed) Ralph Platt, attorney for defendant.

Afterwards, to-wit, on the 21st day of December, 1901, the following order was made by the court of first instance in said cause, which said order, is in the *orders* and figures following, to-wit:

MANILA, 21*st December*, 1901.

The appeal is admitted and the case shall be duly forwarded to the supreme court. It was so ordered and signed by the honorable judge.

(Signed) FLETCHER LADD.

Afterwards, to-wit, on the 8th day of January, 1902, the said cause was forwarded to the clerk of the supreme court, by letter of transmittal, which said letter of transmittal is in the words and figures following, to-wit:

In the Court of First Instance of the City of Manila, P. I.

MANILA, *January 8th*, 1902.

To the clerk of the supreme court of the Philippine islands.

SIR: I have the honor to forward to you herewith case number 131 against Thomas E. Kepner for estafa by virtue of an ap-
7 peal taken by the prosecuting attorney against the judgment of acquittal rendered therein. I beg to state that the delay in transmitting the case was due to translating the testimony in English comprising 101 pages, which is not yet terminated.

Respectfully,

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila.

(Endorsed:) Filed, this 9th day of January, 1902, at 8:46 a. m. F. C. Fisher, clerk of the supreme court, by E. H. Cole, deputy.

Afterwards, to-wit, on the 9th day of January, 1902, came Thomas E. Kepner, personally and by his attorney, and moved that said cause be dismissed, which said motion is in words and figures as follows, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

Motion of Respondent to Dismiss the Appeal of the United States.

Comes now the respondent, personally and by Ralph Platt his attorney, and moves the court to dismiss the appeal taken on behalf of the United States of America in the above entitled cause for that under the laws now in force in the Philippine islands, the United States is not entitled to an appeal in a criminal case from a finding of not guilty and a judgment of acquittal.

(Signed) THOMAS E. KEPNER,
In His Own Behalf, Respondent.

(Signed) RALPH PLATT,
Of Counsel with Respondent.

(Endorsed:) Copy of the foregoing motion received this 6th day of January, 1902. (Signed) L. R. Wilfley, attorney general. Filed this 9th day of January, 1901, 11:02 a. m. (Signed) E. H. Cole, deputy clerk.

8 Afterwards, to-wit, on the 20th day of January, 1902, the court met in public session and the hearing was announced of the motion of Thomas E. Kepner, the accused in case No. 571, of the docket of this court, for the dismissal of the appeal of the prosecuting attorney against the judgment of acquittal rendered at first instance. The accused Kepner appeared on his own behalf, the solicitor general, Don Gregorio Arraneta, appearing on behalf of the Government. After argument by counsel, the motion was submitted and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 6th day of February, 1902, at a closed session of the court, upon motion of the chief justice, the following resolution was unanimously adopted:

"The motion of the defendant Kepner in case No. 571 of the docket of this court for the dismissal of the appeal taken by the prosecuting attorney against the judgment of acquittal rendered at first instance is denied."

[On the margin:] F. C. F.

Afterwards, to-wit, on the 19th day of July, 1902, came Thomas E. Kepner, by Frederick Garfield Waite, his attorney, and renewed his motion to dismiss said appeal, which said motion is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

Motion to Dismiss Appeal.

Comes now the defendant and appellee in the above entitled cause, by Frederick Garfield Waite, his attorney, and moves the court to dismiss the appeal in the above entitled cause for that under the laws in force in the Philippine islands, the United States
9 is not entitled to an appeal from a finding of not guilty and judgment of acquittal in any criminal cause.

[On the margin:] F. C. F.

(Signed) FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Received a copy of the foregoing document this 19th day of July, A. D., 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office this 16th day of August, 1902 F. C. Fisher, clerk of the supreme court, by E. H. Cole, deputy.

Afterwards, to-wit, on the 1st day of September, 1902, the hearing of the motion of the accused Kepner for the dismissal of the appeal of the prosecuting attorney against the judgment of acquittal rendered at first instance in case No. 571 of the docket of this court, was announced: Attorney F. G. Waite, appeared on behalf of the accused, and the solicitor general, Don Gregorio Araneta, on behalf of the Government. After argument by counsel, the motion was submitted to the court and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 16th day of September, 1902, the following resolution was adopted: "Resolved unanimously that the motion of the defendant Kepner in case No. 571, for the dismissal of the appeal of the prosecuting attorney, against the judgment of acquittal rendered at first instance is denied."

[On the margin:] F. C. F.

Afterwards, to-wit, on the 19th day of September, 1902, the court met in public session and the hearing was announced of case No. 571, The United States *vs.* Kepner,—Attorney F. G. Waite, appearing on behalf of the defendant, and Don Gergorio Araneta, appearing on behalf of the Government. After argument by counsel the case was submitted and taken under advisement.

[On the margin:] F. C. F.

Afterwards, to-wit, on the 11th day of October, the decision of the court was announced on the motion of the accused Kepner, in case No. 571, to dismiss the appeal of the prosecuting attorney from the judgment of acquittal rendered at first instance, which said decision is in the words and figures following, to-wit:

10 THE UNITED STATES, Plaintiff and Appellant, *vs.* THOMAS E. KEPNER, Defendant and Respondent. } Register General, No. 571.

Decision.

The defendant in this case was brought to trial in the court of first instance of Manila on the charge of "estafa," and after a full hearing of the case he was acquitted. From the judgment of acquittal the prosecuting attorney took an appeal to this court by virtue of the provisions of G. O. 58, sections 43, 44 *et seq.*, and the defendant now asks that the appeal so taken be dismissed on the ground that the Government is "not entitled to an appeal from a finding of not guilty, and a judgment of acquittal in a criminal case." A similar motion heretofore made by counsel for the accused was denied by this court. The renewal of the motion is based on the theory that that portion of the "Philippines bill," recently passed by Congress,

which secures a defendant against more than one jeopardy of punishment for the same offense, ought to receive the same construction given like provisions in the Constitution of the United States and the constitutions of various States of the Union and that therefore the previous ruling should now be reversed.

The court is still of the opinion that no jeopardy attaches to the defendant until the judgment for or against him has become final, and that the act of Congress temporarily providing for the administration of affairs in the Philippines affords no ground for any change in the ruling made on the first motion. Now, as then, the question is, Has the defendant been placed once in jeopardy by his trial and acquittal in the lower court? If he has, then he cannot again
11 be tried on the same charge, and the appeal ought not to be entertained as no result could follow its determination. If he has not then the appeal must be heard and determined in conformity with the law of procedure now in force in these islands.

All civilized peoples are substantially agreed that when a person accused of crime has been once finally convicted or acquitted of the charge against him he ought not to be vexed again by a prosecution for the same offense. The plea of once in jeopardy is the *res adjudicata* of the criminal case.

But, just when the right to the plea accrues, just when a defendant may call it to his protection and avail himself of it as a shield against further prosecution on the same charge, has presented, particularly to some American courts, difficulties which by the way do not arise from any perplexities inherent in the plea itself, but rather from a more or less rigid adherence to a long line of precedents which nobody seems willing to disturb but which nearly all admit, have now but little if any sound reason to support them.

Formerly, in England, the right to plead jeopardy after an acquittal or conviction was the necessary adjunct, the indispensable auxiliary of the trial by jury, inasmuch as the right of trial by his peers, reluctantly conceded as a remedy for judicial abuses, would have availed the citizen but little if the verdict of the twelve men good and true had been left to the mercy of a pliant judiciary who were the mere creatures of the authority or influence which made them.

12 Hence, no appeal was permitted from the verdict of the jury or from the judgment entered in conformity with it. Both were final and therefore the jeopardy became complete, not because there had been a conviction or an acquittal but because the question of innocence or guilt, of punishment or no punishment had been finally determined beyond all possibility of judicial change or alteration. From the fact, however, that the verdict of the jury, marked the final and definite determination of the proceeding it came to be regarded as the test of whether or not there was a completed jeopardy, and from this in its turn arose the correlative principle that once the trial had been begun before a competent court and jury, upon a valid indictment, no step backward being possible, any discharge of the jury not resulting by consent of the prisoner

or from a cause beyond the control of the court, perfected a jeopardy of the accused which he might plead in any subsequent prosecution against him on the same charge. This construction, by which the verdict of the jury and not the final determination of the case was made the test of an accrued jeopardy could affect no rights in England, either of the State or of the accused, inasmuch as the same result had to follow whether one construction or the other was adopted.

In some few States of the Union, however, whose constitutions gave voice to the common law maxim, that no man shall be brought in jeopardy twice for the same offense, the acceptance of the
13 verdict of the jury as the sole test of the accomplished jeopardy resulted in the reading into the constitutional provision the finality of a verdict of acquittal and the enunciation of the consequent doctrine that from a verdict of acquittal there could be no appeal even though such a step were expressly authorized by statutory enactment. This, too, although the courts of these very States found it entirely consistent to uphold the right of an accused to appeal from a judgment of conviction and secure a new trial upon the convenient doctrine lugged in by the ears that by taking an appeal the defendant waived his right to plead jeopardy. That is to say, he waived his plea—a most substantial right—when he sought by appeal to have an illegal conviction set aside for errors committed against him, but when the State invoked the same remedy to vacate an illegal acquittal secured, let us say, by his successful objection to proper, competent and material evidence of his guilt, he waived nothing.

The proposition that a person accused of crime is entitled to have an illegal and improper judgment against him modified, corrected, and set aside and that the State can have no relief against a similar judgment in his favor has neither sound sense nor sound law to support it. It prevents uniformity in the administration of justice and strikes at the ultimate purpose of all jurisprudence—a correct judgment legally obtained. The defendant has no higher right to be protected against an improper conviction than has the body politic to be secured against an unlawful*l* acquittal and a
14 miscarriage of justice. At first, when judges were the corrupt and willing tools of tyrannical power there may have been good reason for not permitting an appeal by *either* side from the verdict of twelve men duly selected to try the case, but when the courts became good enough to pass on the validity of a verdict of conviction, it would seem that they might be safely trusted to pass on the legality of a verdict of acquittal. When the reason for the rule ceased the rule ought to have ceased with it, and at all events it should not be read into the organic law as a limitation on legislative power to provide a proper remedy for the correction of judicial errors and mistakes.

But even if the cases cited by respondent (People *v.* Weber, 38 Cal., 467, and 19 Ill., 342) are correct in construing that the constitutional provision on jeopardy makes the judgment of acquittal

final and beyond attack or impeachment, their authority is of little avail in support of the motion unless it can be further shown that Congress adopted the jeopardy clause of the "Philippine bill" not in the light of existing insular laws but in the light of a judicial construction applicable at the best to jury trials, which have not now, never have had and are not likely to have in the immediate future any place in the jurisprudence of the archipelago.

The court is of the opinion that Congress did nothing of the kind. Any other conclusion would lead to the assumption that Congress intended the provision under discussion to be interpreted by
15 precedents not only far from satisfactory to many of the best jurists of its own country, but wholly at variance with the judicial system, procedural law and established precedents of the people for whose benefit the law was enacted.

Before the change of sovereignty there never was in the Philippine islands any finality to the judgment of the trial court in felony cases until it had been ratified and confirmed by the court of last resort. Such a judgment was merely advisory to the appellate tribunal, and might be modified, set aside, or changed, on the review of the record, either to the benefit or the prejudice of the defendant, *with or without an appeal*. Whether the court of first instance acquitted the defendant or convicted him he could not be placed at liberty in the one case or receive the punishment adjudged in the other until the reviewing authority had finally affirmed the judicial determination of the lower court. More than that, if the trial court *acquitted* the accused the *audiencia* (supreme court) might convict him, and if he was convicted it might raise or lower his punishment or even acquit him altogether.

This was *was* the law of the land when the change of sovereignty took place and it has only been modified since to the extent of making the judgments of courts of first instance in felony cases (except those for capital offenses) *final unless an appeal has been taken either by the attorney general or the accused*. So the-, so now, once a criminal cause is before the court, whether on appeal or in "consulta" the judgment may be changed, altered or reversed as to the appellate tribunal may seem proper.

16 Not being inconsistent with the act of Congress this law cannot be construed to have been repealed by implication, and it must be held to be now in full force for the purposes it was designed to effect.

To be in jeopardy in the legal sense it is not sufficient that the danger should have begun. It must also have ended before the plea can be made effectual. Jeopardy is not the peril of more than one trial, but the peril of more than one punishment, and in the same proceeding there can be no danger of a *second punishment* until the first has been *finally* adjudged.

Attention is called to the following decisions of this court and its immediate predecessor: D. Juan Garcia *v.* Cesar Lopez Garcon, criminal branch supreme court of justice, P. I., September 12th,

1900. United States *v.* Mateo Perez, supreme court P. I., April 9th, 1902.

For the foregoing reasons the court is of the opinion that respondent's motion to dismiss the appeal taken by the Government must be denied, and it is so ordered with costs against the moving party.

(Signed) JAMES F. SMITH, *Judge.*

We concur:

(Signed) CAYETANO ARELLANO, *Chief Justice.*
" FLORENTINO TORRES.
" J. T. COOPER.
" VICTORIANO MAPA.
" CHARLES A. WILLARD.
" FLETCHER LADD.

Afterwards, to-wit, on the 3rd day of December, 1902, the supreme court of the Philippine islands, announced its decision on the merits of the said case No. 571, The United States, *vs.* Thomas E. Kepner, which said decision is in the words and figures following, to-wit:

17 United States of America, Supreme Court of the Philippines.

THE UNITED STATES
vs.
THOMAS E. KEPNER.

Decision on the Merits.

Registro general, No. 571.

Thomas E. Kepner, an attorney at law, was charged in the court of first instance of the city of Manila with the crime of "estafa," alleged to have been committed by him by endorsing a warrant of the insular government made payable to his client Aun Tan and collecting and appropriating to his own use the amount due thereon without the authority or consent of the latter.

The accused was tried on the charge and after hearing the evidence of both sides the trial judge was of the opinion that there was evidence tending to show that the appropriation of the amount of the warrant was made under a *bona fide* claim of right. He therefore acquitted the defendant and the fiscal appealed.

Wong Cheong and Aun Tan, Chinese bakers, were charged before a military commission with illegally having in their possession some 400 sacks of com-issary flour, the property of the United States, against the statute and military regulations in such cases made and provided. On March 24th, 1901, while they were in confinement, O. C. Hing, a Chinese friend of the parties, retained Kepner to obtain their release on bail and to defend them before the mil-

itary court. It was agreed that the attorney should receive
18 for his professional services $300 Mex. cash and $700 Mex. additional on condition that he saved Wong Cheong and Aun Tan from fine or imprisonment, and secured the return of the flour which had been seized by the authorities. After obtaining the release of his clients on $3,000 Mex. bail and taking the statements, Kepner came to the conclusion on the 1st of May, 1901, that both were guilty of the offense with which they were charged and that in no event would he be able to procure a release of the flour. He therefore told the accused Chinamen as well as Hing "that it was absolutely out of the question to stand by the original agreement" and offered to return the $300 which had been already paid. He finally allowed himself, however, to be pursuaded to continue with the case for a consideration which he says was an unconditional fee of $500, payable on the determination of the cause. Hing says no agreement for an unconditional fee was ever made. His story is that after Aun Tan had been released on bail, Kepner declared that he could not get the flour back and proposed that that contingency should be eliminated from their understanding. To this proposition Hing consented and Kepner agreed to secure Wong Cheong and Aun Tan against fine or imprisonment for the sum of $500 in addition to what he had previously received. The trial of the two men took place about the 4th of May, 1901, and resulted in the acquittal of Wong Cheong and the conviction of Aun Tan, who was fined $1,000 gold and paid it.

On the 9th of May Kepner sent Hing a bill "for services *In re* The United States *v.* Wong Cheong and Aun Tan, as per agreement, $500.00." Hing flatly refused to pay the account on the ground that Aun Tan had been fined and that there was
19 nothing due under the terms of the contract. On June 20th, Kepner apparently yielded the point, for on that date he borrowed from Hing, his alleged debtor, $150.00, which he promised to repay on or before the 20th of July next ensuing. This he would scarsely have done if Hing had been indebted to him at the time in the sum of $500 for services which he asserted had been fully completed.

On the 1st of July, 1901, Hing went to the office of Kepner and asked him to make an effort to get the fine remitted and the confiscated flour returned. Hing says Kepner agreed to obtain the restoration of the fine and the flour for the sum of $1,000 Mex. Kepner says he agreed to get back the fine for a consideration of $500 Mex. and "that no agreement had been reached on the flour proposition" nor anything said on the subject beyond a conversation touching the making of an application for its recovery, and an offer on his part to do the work for $500. Kepner presented his petition for a remission of the fine, but before it had been acted upon officially, so far as appears from the evidence, he again made a demand on Hing for money, which was refused. Considering however, that the appellee had obtained the acquittal of Wong Cheong, Hong offered to allow him $250 in settlement of the second

contract, and the offer would appear to have been finally and definitely accepted by Kepner in his letter of the 12th of August, 1901, in which he says:

"DEAR MR. HING: I am surprised that you should say that you only owe me $250.00, but *until the fine is returned I will let it go that way.* I have received from you $150.00, clothes $36.00, balance due on collections, $21.25, balance due me $42.75. Please pay balance of $42.75 to Mr. Denmark, and oblige.

Yours respectfully, THOMAS E. KEPNER."

20 & 21 The sum of $42.75 was paid by Hing as directed by this letter, and on the 12th day of August, 1901, all sums then due by Hing to Kepner had been paid, and Hing so understood it.

Two days later, namely, on the 14th of August, 1901, although he had not yet received the return of the fine, Kepner notified Hing that the military authorities had remitted the fine and requested him to call the next day "and pay his bill in this case amounting as per agreement to $750.00 Mexican currency," apparently reviving his claim under the second contract and adding $500 for an alleged completion of the third contract. Hing refused to pay, saying that nothing was due or would become due until the fine and flour were recovered.

On the 24th of August Kepner received $200 from Hing as a loan, according to the latter, as a payment on the second contract according to the former. How anything could have become due in view of the settlement of August 12th, 1901, and in view of the fact that the fine had not been repaid, does not appear.

Although the fine was remitted and an order made for its return Kepner found that the money had been turned into the insular treasury, and that he could not get it without an act of the commission authorizing its payment. The mere fact that this formal act of the commission was required to get money out of the treasury caused Kepner, if he is to be believed, to despair of ever recovering of the fine, and he "threw up the case." According to his account he was induced to take it up again however, for a consideration,

50% of the amount recovered, which he says Hing agreed to

22 pay. Hing says he did nothing of the kind. However that may be the appellee wrote a letter to General Chaffee, asking him to refer the matter to the commission for an appropriation bill and on the 20th day of September a warrant in favor of Aun-Tan for $1,000 gold was drawn on the insular treasury by the civil governor, and countersigned by the auditor. The treasurer on the face of the warrant executed an order to the Chartered Bank of India, Australia and China to pay the warrant, and the same was then delivered to Kepner. Kepner requested Aun Tan to either endorse it or give him power to cash it, and Aun-Tan positively refused to comply. Kepner then told Hing that he would put the warrant in his safe until they could reach some agreement. On the 23rd of September, the following letter was written to Hing by Kepner:

"Mr. O. C. Hing, Calle Magallanes, No. 19, Intramuros.

My Dear Sir: I have to inform you that if you do not settle your account with me before Tuesday noon (September 24th) or endorse the draft I hold, I shall sue you and foreclose my lien on the draft.

Yours respectfully, THOMAS E. KEPNER."

On the very same day, September 23rd, without waiting until the following day, as indicated in his letter, Kepner, in the very teeth of Aun Tau's refusal to endorse the draft or to authorize its collection, wrote Aun Tan's name on the back of it by himself as attorney, presented it to the bank, represented that he had a power of attorney to make the endorsement, and had the full amount of the warrant credited to his account. He would not say that this account then amounted to more than $5.40.

23 On the very same 23rd of September, exclusive of the check to Hing, he drew checks against the $1,000 gold or $2000 Mex., so credited to him, for more than $1217.50 Mex. to pay personal bills. So that on the 24th of September, when he handed Hing a check for $450.00, Mex. and his receipted bill for $1550.00 Mex, the whole $2,000 Mex. had not only been actually appropriated, but more than $1200 Mexican of the sum had been actually expended by Kepner in the payment of personal accounts.

The sums paid by Hing to Kepner were $300 retainer on the first contract, $250.00 for the acquittal of Wong Cheong under the second contract, and $200 advanced on the third contract for the return of the fine and the flour—$750.00 in all. According to Kepner there accrued to him $300 for his retainer on the first contract, $500 under the second contract which he claims was unconditional, $1,000 for having secured the return of the fine, and $500 for having attempted to obtain the redelivery of the flour, which feat, he says, he knew could not be accomplished, and for the doing of which, he says, he never had any understanding whatever with Hing, Wong Cheong or Aun Tan—$2300 in all. He admits receiving from Hing the sum of $750, leaving a balance of $1550.00 which he paid to himself by cashing the warrant and crediting the entire proceeds to his account. That is to say, Kepner's charges for services amounted to $300 more than the whole amount of the fine.

24 The appellee's account of his transactions with his clients is such that his credit as a witness is wholly destroyed as to the disputed facts of the case. His own story shows him to be a man lacking in principle and wholly unworthy of the honorable profession to which he unfortunately belongs. He may have been entirely right in cancelling his first contract to defend the accused Chinamen for a retainer of $300 and $700 additional contingent on the result. But why did he wait from March 24th until May 1st, the eve of the trial before doing so? Was it to diminish the chance of the engagement of other counsel and so force his clients to accept such terms as he might offer? He may not have been actuated by

any such motive, but in view of his subsequent conduct it smacks of it. The circumstance may have justified his agreeing for a fee of $500 to obain a return of the fine which had been justly imposed on Aun Tan whom he knew to be guilty, but what is his justification for breaking his agreement in the very moment of success and forcing his clients to agree to pay double his fee for the very same service? Why did he state to Hing after the fine had been remitted by competent authority that he could not recover the money when all that remained to be done was a mere authorization of the commission which would have — conceded, as it was, for the bare asking? Was it to give him an excuse to extort from his clients an additional fee of $500 for the very trivial service of writing a letter to General Chaffee asking him to notify the commission that the fine had been remitted in order that an appropriation bill might be passed enabling the withdrawal of the money from the in-
25 sular treasury? What right did he have to collect $500 for endeavoring to obtain a return of the confiscated flour, a charge which he admits was for services impossible of and wholly unwarranted by any under-standing whatever? fairly accomplishment A But if he can A explain all this, F. C. F. under what rule of law or morals does he justify his act of representing to the bank that he had authority from Aun Tan to collect the insular warrant, when he knew that such authority had been definitely, positively and expressly refused.

Kepner's own testimony justifies the court in concluding that he sought to take a grossly unfair advantage of a confidential relation, and that he is unworthy of credence.

The second agreement as testified to by Hing is therefore accepted by the court and Kepner's account as to that agreement and the subsequent agreements is rejected. Considering that all he accomplished for his clients was to save them from fine or imprisonment in conformity with the second contract, and considering that he was paid $750 for the service, there only remained $50 due him at the time he cashed the warrant. He therefore unlawfully misappropriated $1500.00 viewing the case from the standpoint that the money was the money of Aun Tan and giving Kepner credit for the $450 check delivered to Hing. But if we admit the truth of all that the accused says, if we forget that he took out of the warrant $500 for services rendered to secure the flour without either contract, agreement or understanding with his clients to
26 justify it, if we concede that in all his transactions with Aun Tan he acted in good faith, he is nevertheless guilty of the crime of "estafa."

The warrant delivered into his hands, drawn by the insular government in favor of Aun Tan on the Chartered bank, was the property of Aun Tan, but the money which it represented was not, until it had been delivered to the bank for payment, properly and legally endorsed by Aun Tan, or by his authority. Aun Tan had no money in the bank and no monetary loss was inflicted on him by

illegally cashing his warrant. The injury to him was the delay, annoyance and damage caused by the unlawful misappropriation of the warrant. In a word the bank would have been compelled to pay Aun Tan the amount of the warrant notwithstanding a previous payment to Kepner.

If this be so on the undisputed facts of the case the defendant withdrew from the Chartered bank and appropriated to his own use $2,000 Mex. of its funds by representing to the bank that he had a power of attorney and authority which he did not possess, and *that* constitutes the crime of estafa under the provisions of art. 535, subdivision 1, of the Penal Code.

The allegation of the complaint that the unlawful misappropriation of the proceeds of the warrant was to the prejudice of Aun Tan may be disregarded by virtue of section 7 of G. O. 58, which declares that when an offense shall have been described in the complaint with sufficient certainty to identify the act an erroneous allegation as to the person injured shall be deemed immaterial. In any event the defect, if defect it was, was one of form which did not
27 tend to prejudice any substantial right of the defendant on the merits, and cannot, therefore, under the provisions of section 10 of the same order affect the present proceeding.

It has been stipulated between the appellee and the fiscal that certain affidavits may be considered as evidence on the review and examination of the record by this court on appeal. These affidavits show that Kepner on the 12th of October, 1901, after the question of the validity of his endorsement had been called to his attention by the bank, volunteered to make good to the bank any deficiency which might exist between his account and the amount of the warrant, and that to make this amount good he deposited with the bank, after his arrest and on the 30th of October 1901, $2000 Mex. The affidavits further show that on the 10th of May, 1902, he effected a full, voluntary and satisfactory settlement with his client of all financial differences.

His promise to return the money about the time he was threat-ed with arrest and his subsequent return of it after his arrest, as well as the settlement of his financial differences with his clients constitute no defense to the crime, which, if committed at all by him, was committed on the 23rd of September, 1901. Restitution is not even an attenuating circumstance under article 10 of the Penal Code. It is a matter to be considered solely by the Executive in the exercise of the pardoning power.

The judgment of the lower court acquitting the defendant is reversed with costs against the respondent. Taking into consideration all the evidence in the case the court finds:

1st. That the defendant received on the 21st of September
28 1901, from the insular government for the use and benefit and as the property of his client a certain warrant drawn in favor of said Aun Tan for the sum of $1,000 gold, which the insular treasurer by proper order on its face directed the Chartered Bank of India, Australia and China to pay to said Aun Tan.

2nd. That said defendant against the will and without the consent of said Aun Tan wrote the name of Aun Tan by himself as attorney on the back of said warrant and presented the same to said bank for payment.

3rd. That he represented and stated to said bank that he had a power of attorney from Aun Tan to make such endorsement, and that his representation and statement to that effect to the bank was false and untrue as he the said defendant well knew when he made it.

4th. That in consequence of said unauthorized endorsement by the defendant and his aforesaid false representation and statement to the bank said warrant was cashed, and the whole amount thereof, $2,000 Mex. credited to appellee's personal account in said bank on the 23rd day of September, 1901.

5th. That afterwards, and on the said 23rd of September, 1901, defendant used of said sum so credited to his said account more than $1217.50 Mex. and possibly $1337.50 Mex. for the payment of personal bills and expenses.

6th. That on the 24th of September, 1901, defendant delivered to O. C. Hing for Aun Tan his personal check on said bank for $450, and his receipted bill of $1550 for services rendered, but that said check was never cashed by Aun Tan nor was said bill for $1550 accepted as correct or just.

7th. That neither on the 23rd of September, 1901, nor on the 24th of the same month and year was any greater sum due from said Aun Tan to said defendant than the sum of $50 Mex.

29 Taking into consideration the provisions of article 534, article 535, numbers 1 and 5, and articles 58 of the Penal Code, the court finds as a conclusion of law from the foregoing facts that the defendant Thomas E. Kepner willfully, illegally, fraudulently and feloniously misappropriated and converted to his own use said warrant and the sum of money which he collected thereon, and that he is guilty of the crime of estafa within the intent and meaning of article 535, subdivisions 1 and 5 of the Penal Code.

Wherefore, by reason of the law in such cases made and provided and the articles of the Penal Code above cited, the court orders and adjudges that the defendant Thomas E. Kepner be and he is hereby condemned to one year, eight months and twenty-one days' imprisonment (presidio correccional) with the forfeiture of all public office, profession, trade, and right of sufferage, with costs.

Taking into consideration that the amount collected on the warrant was returned to the bank on the 30th of October, 1901, and that all financial differences between the defendant and Aun Tan were finally amicably settled in May, 1902, no judgment for the return of the money is made, but it is ordered and adjudged that the warrant which forms a part of the record herein be returned to

Aun Tan and that the clerk attach to the record a duly certified copy of said warrant in lieu thereof.

(Signed) JAMES F. SMITH, *Judge.*

We concur:

(S'g'd) CAYETANO ARELLANO, *Chief Justice.*
(S'g'd) FLORENTINO TORRES.
(S'g'd) J. T. COOPER.
(S'g'd) VICTORIANO MAPA.
(S'g'd) CHARLES A. WILLARD.

Afterwards, to-wit, on the 11th day of December, 1902, came Thomas E. Kepner, and filed the following exception to the decision of the court, which said exception is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.
} Case Numbered 571.

Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and excepts to the decision of the court reversing the finding of not guilty and judgment of acquittal heretofore entered by the court of first instance in this cause.

(Signed) FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Filed in the clerk's office this 11th day of December, 1902, at 2:50 p. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

Afterwards, to-wit, on the 13th day of December, 1902, the following judgment was entered, to-wit:

United States of America, Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Appellee. } Case No. 571.

Judgment, December 13, 1902.

Judgment Book No. 1, p. 306.

The court having regularly acquired jurisdiction for the trial of the above entitled cause, submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the 3rd day of December, A. D., 1902,

By virtue thereof it is hereby adjudged and decreed that
31 the judgment of the court of first instance of Manila, dated the eighteenth day of December, A. D., 1901, and against which the above entitled appeal was taken, be and the same is reversed and the accused Thomas E. Kepner is condemned to one year, eight months and twenty one days of correctional imprisonment, together with the suspension from any public office, profession, or trade, or right of suffrage, together with the costs.

It is further ordered that the said cause be remanded to the court of first instance for the corresponding effects.

(Signed) F. C. FISHER, F. C. F.
Clerk of the Supreme Court of the Philippine Islands.

(Endorsed:) Filed this 13th day of December, 1902, at nine a. m. (Signed) F. C. Fisher, clerk of the supreme court. [Seal.]

And afterwards, to-wit, on the 13th day of December, A. D. 1902, there was filed in the clerk's office of said court in the above entitled cause a petition for a writ of error, said petition being in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippines.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
against
THOMAS E. KEPNER, Defendant and Respondent.

Petition for Writ of Error and Supersedeas. F. C. F.

Thomas E. Kepner, defendant and respondent, in the above entitled cause, feeling himself aggrieved by the decision of the court

made on the 3rd day of December, A. D. 1902, and the judgment entered on the 13th day of December, A. D. 1902, comes now by Frederick Garfield Waite, Esquire, his attorney, and petitions said court for an order allowing said defendant to prosecute a writ
32 of error to the honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and in accordance with the provisions of an act of the Congress of the United States entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes," approved July 1st, 1902; and also that an order be made fixing the amount of security which defendant shall give pending said writ of error, and that, upon the giving of said security, all further proceedings in this court be suspended and stayed, until the determination of said writ of error by said United States Supreme Court.

FREDERICK GARFIELD WAITE,
Attorney for Defendant and Respondent.

(Endorsed:) Received a copy of the foregoing petition for writ of error, December 13th, 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office, supreme court of the Philippines, this 13th day of December, 1902, at 10:00 a. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 13th day of December, A. D., 1902, there was filed in the clerk's office of said court an assignment of errors in said cause, which said assignment of errors is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
against
THOMAS E. KEPNER, Defendant and Respondent. } Case Number 571.

Assignment of Errors.

Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and assigns the following assignment of
33 error- upon which he will rely upon his prosecution of the writ of error in the above entitled cause.

I. That this court erred in entertaining an appeal by the United States from the finding of not guilty and judgment of acquittal rendered by the court of first instance of the city of Manila, in this cause, and that this court had no jurisdiction to entertain said appeal, or jurisdiction of this cause, for that said defendant and respondent was never legally tried in said court of first instance of the

city of Manila by a jury as provided in article III, section 2, and amendment VI, of the Constitution of the United States.

II. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the court of first instance of the city of Manila, made by said defendant on the grounds that under general orders numbered 58, office of the United States military governor in the Philippine islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty, and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States, amendment V, which provides that no person shall "be subject for the same offense to be twice put in jeopardy," which said motion was overruled by this court on the 6th day of February, A. D., 1902.

III. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judg-
34 ment of acquittal rendered in the court of first instance of the city of Manila, made by said defendant and respondent on the grounds that under general orders, numbered 58, office of the United States military governor in the Philippine islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further because such appeal is prohibited by the Constitution of the United States, amendment V, which provides that no person shall "be subject for the same offense to be twice put in jeopardy, 2 and, further, upon the ground that such appeal was prohibited by the act of the Congress of the United States, entitled, "An act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes," which said motion was overruled by this court on the 11th day of October, A. D., 1902.

Wherefore, the said Thomas E. Kepner, plaintiff in error, prays that the judgment of the supreme court of the Philippine islands be reversed, and said cause against him be dismissed, and that he go hence without day.

FREDERICK GARFIELD WAITE,
Attorney for Thomas E. Kepner, Plaintiff in Error.

(Endorsed:) Received a copy of the foregoing assignment of errors this 13th day of December, A. D., 1902. (Signed) Gregorio Araneta, solicitor general. Filed in the clerk's office of the supreme court of the Philippine islands this 13th day of December, A. D., 1902, at 10:00 a. m. F. C. Fisher, clerk of the supreme court, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 16th day of December, 1902, the following ~~A~~ order was ~~A~~ had and entered by the judges of the supreme court of the Philippine islands, in said cause, to-wit: minute unanimously F. C. F.

35 "In the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent.

"Upon motion of Frederick Garfield Waite, Esquire, attorney for "defendant and respondent, and upon filing a petition for a writ of "error, and an assignment of errors, it is ordered that a writ of "error be and hereby is allowed to have reviewed in the Supreme "Court of the United States, the judgment heretofore entered herein, "and that the writ is to operate as a supersedeas and stay of execu- "tion upon the giving and executing by the defendant of a bond in "due form in the penal sum of $4,000 U. S. currency, with two or "more sufficient sureties thereon duly approved by any judge of "the supreme court of the islands, conditioned that said defendant "shall prosecute his writ of error to effect, and that he will answer "and surrender himself in conformity with the judgment of said "supreme court of the Philippine islands and in satisfaction thereof "should the same be found without error or finally confirmed by "said Supreme Court of the United States."

36 And afterwards, to-wit, on the 17th day of December, A. D. 1902, the following order was had and entered of record in said cause, by the chief ~~A~~ justice of the supreme court of the Philippine islands, which said order is in the words and figures following, to-wit: F. C. F.

In the Supreme Court of the Philippine Islands, at the Court Room in the City of Manila, in the Philippine Islands, on Wednesday, the Seventeenth Day of December, in the Year of our Lord One Thousand Nine Hundred and Two.

Present: The honorable judges of the supreme court of the Philippine islands,—

UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
THOMAS E. KEPNER, Defendant and Respondent. } Case Number 571.

Upon motion of Frederick Garfield Waite, Esquire, attorney for defendant and respondent, and upon filing a petition for a writ of

error, and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the writ is to operate as a supersedeas and stay of execution upon the giving and executing by the defendant of a bond in due form in the penal sum of $4,000 U. S. currency, with two or more sufficient sureties thereon duly approved by any judge of the supreme court of the islands, conditioned that said defendant shall prosecute his writ of error to effect, and that he will answer and surrender himself in conformity with the judgment of said supreme court of the Philippine islands and in satisfaction thereof should the same be found without error or finally confirmed by said Supreme
37 Court of the United States.

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

Endorsed: Filed in the clerk's office of the supreme court of the Philippine islands, this 17th day of December, A. D. 1902. F. C. Fisher, clerk.

And afterwards, to-wit, on the 29th day of December, A. D. 1902, there was filed in the clerk's office of said court in the above entitled cause a bond; which said bond is in words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

UNITED STATES OF AMERICA, Plaintiff and Appellant, *against* THOMAS E. KEPNER, Defendant and Respondent.	Case Numbered 571.

Know all men by these presents, that we, Thomas E. Kepner, as principal, and P. J. Moore and Pio Barretto as sureties, are held and firmly bound unto the United States of America, in the sum of four thousand dollars, lawful money of the United States; to which payment well and truly to be made, we bind ourselves, and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of December, in the year of our Lord, one thousand nine hundred and two.

The condition of this obligation is such, that, whereas, the above named Thomas E. Kepner, has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled cause, by the supreme court of the Philippine islands: Now therefore, if the said Thomas E. Kepner shall prosecute said writ
38 of error to effect, and answer and surrender himself in conformity with the judgment heretofore rendered by the su-

preme court of the Philippine islands in said cause, should said judgment be affirmed or found without error by the Supreme Court of the United States, then, and in that event, this obligation shall be null and void, otherwise to be and remain in full force and virtue.

THOMAS E. KEPNER. [SEAL.]
P. J. MOORE. [SEAL.]
PIO BARRETTO. [SEAL.]

CITY OF MANILA, ISLAND OF LUZON, *Philippine Islands,* } *ss:*

P. J. Moore and Pio Barretto came before me personally, and being first duly sworn, each for himself deposes and says that he is a resident of the city of Manila, island of Luzon, Philippine islands, and worth the sum of four thousand dollars exclusive of debts and liabilities.

P. J. MOORE.
PIO PARRETTO.

Subscribed and sworn to before me, this 29th day of December, A. D., 1902.

E. H. COLE, [SEAL.]
Deputy Clerk of the Supreme Court of the Philippine Islands, ex-Officio Notary Public.

Approved:
JAMES F. SMITH,
Justice Supreme Court, P. I.

Endorsed: Received the foregoing document in the office of the supreme court of the Philippines this 29th day of December, 1902 at 11 o'clock a. m. F. C. Fisher, clerk of the supreme court by (signed) E. H. Cole, deputy.

39 And afterwards, to-wit, on the 2nd day of January, 1903, a motion was filed in the clerk's office of the supreme court of the Philippine islands, which said motion is in the words and figures following, to-wit:

United States of America, Philippine Islands, Supreme Court.

THOMAS E. KEPNER, Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error. } Case Numbered 571.

And now comes said plaintiff in error by Frederick Garfield Waite, his attorney, and prays that this honorable court enter an order directing the clerk thereof to make an duplicate original of

the record in this cause in the English language to the end that said duplicate original of the record duly certified, may be transmitted as the record in this cause to the Supreme Court of the United States.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiff in Error.

Endorsed: Received a true copy of the above motion this — day of December, 1902. (Signed) Gregorio Araneta, solicitor general. Filed this 2nd day of January, 1903, at 8:30 o'clock a. m. F. C. Fisher, clerk of the supreme court of the Philippine islands, by (signed) E. H. Cole, deputy.

And afterwards, to-wit, on the 3rd day of January, 1903, the following order was had and entered in the record of said cause, which said order is in the words and figures following to-wit:

United States of America, Supreme Court of the Philippines.

"Resolved unanimously that the following order be entered in case number 571.—The United States *vs.* Thomas E. Kepner.

40 "The clerk is hereby directed to make a duplicate record in English of the above entitled cause, such record to be regarded as an original in the same manner as the Spanish record."

I, F. C. Fisher, clerk of the supreme court of the Philippine islands, do hereby certify the above and foregoing to be a true and correct translation of the transcript of the record and proceedings had in case number 571, in which The United States is plaintiff and appellant and Thomas E. Kepner is defendant and appellee, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, in my office, at Manila, in the Philippine islands, this 3rd day of January, A. D., 1903.

[Seal Corte Suprema, Islas Filipinas.]

FRED C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

41 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THOMAS E. KEPNER, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error. } Writ of Error.

The President of the United States of America to the judges of the supreme court of the Philippine islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the Philippine islands, before you or some of you, between The *United States of America*, plaintiff and appellant, *against Thomas E. Kepner*, defendant and respondent, a manifest error hath happened, to the great damage of the said Thomas E. Kepner, as is said and appears by his petition for a writ of error and assignment of errors, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 3rd day of March next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
42 of the United States, this 2 day of January, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

[Seal Corte Suprema, Islas Filipinas.]

FRED C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ is allowed, and it is ordered that the same shall operate as a supersedeas and stay of execution upon the giving and executing by the defendant of a bond in due form in the penal sum of $4,000 U. S. currency, with two or more sufficient sureties thereon duly approved by any judge of the supreme court of the Philippine islands, conditioned that said defendant shall prosecute his writ of error to effect, and that he will answer and surrender himself in conformity with the judgment of said supreme court of the Philippine islands and in satisfaction thereof should the

same be found without error or finally confirmed by said Supreme Court of the United States.

[Seal Corte Suprema, Islas Filipinas.]

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

United States *v.* Thomas E. Kepner. Writ of error. Filed January 2nd, 1902. F. C. Fisher, clerk. Copy deposited for defendant in error in clerk's office supreme court of the Philippine islands.

43 UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

In obedience to the foregoing writ of error, I herewith transmit to the Supreme Court of the United States a true and complete transcript in English of the record and proceedings in the foregoing entitled cause this 5th day of January, A. D., 1903.

[Seal Corte Suprema, Islas Filipinas.]

F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

41 Habilitado para el Bienio de 1898–99.

U. S. Military Government, 1902, internal revenue.

N. 9.061.740.

Supreme Court.

Sello 12º Aº 1896 y 97 [Vignette] 5 C. de peso.

In the Supreme Court of the United States.

THOMAS E. KEPNER, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error. } Citation.

UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

By the Honorable Cayetano S. Arellano, chief justice of the supreme court of the Philippine islands, to L. R. Wilfley, Esq., attorney general for the Philippine islands, attorney for the United States of America, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of

the Philippine islands, wherein Thomas E. Kepner is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the city of Manila, in the Philippine islands, above named, this 2nd day of January, in the year of our

45 Habilitado para el Bienio de 1898–99.

U. S. Military Government, 1902, internal revenue.

No. 9.061.734.

Supreme Court.

Sello 12ª Aª 1896 y 97. [Vignette] 5 C. de peso.

(Kepner *v.* United States. P. 2.)

Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-seventh.

[Seal Corte Suprema, Islas Filipinas.]

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

Frederick Garfield Waite, Esqr, 34 Escolta, Manila, P. I.; Charles H. Aldrich, Esqr., Home Insurance building, Chicago, Illinois, U. S. A., attorneys for plaintiff in error.

A copy of the within paper has been received at this office this 3 day of Jan., 1903.

L. R. WILFLEY,
Attorney General for the Philippines.

Received in the office of the supreme court of the Philippines, Manila, P. I., this 3rd day of January, 1903.

F. C. FISHER,
Clerk of the Supreme Court,
By E. H. COLE, *Deputy.*

8 / 26 a. m.

Endorsed on cover: File No. 18,875. Philippine islands, supreme court. Term No. 244. Thomas E. Kepner, plaintiff in error, *vs.* The United States. Filed March 23, 1903.

22505

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 244.

THOMAS E. KEPNER, *Plaintiff in Error*,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Statement.

The plaintiff in error was engaged in the practice of law in Manila, and was employed by one Aun-Tan as his lawyer in a criminal case pending before the Military Commission in said city, in which case the United States was the complainant and Aun-Tan and Wong-Chong were defendants. The legal services contemplated seem to have covered the defense of these persons on the criminal charge, and, as was insisted by the prosecution, the recovery of certain bail money deposited as security that the defendants would appear to answer the charge of receiving stolen property, and also, as was claimed by the defendant Kepner, the recovery of the stolen property itself.

In the course of the litigation it was decided by the government officials to return the bail money thus deposited and a warrant for one thousand dollars in gold

was drawn in favor of Aun-Tan, and came to the hands of his attorney, Mr. Kepner. The record shows that at this time the client was indebted to some extent to the attorney, and that some unsuccessful efforts were made by the latter to induce the client to endorse the warrant. Upon his refusal, the attorney endorsed his client's name, "Aun-Tan, by Thomas E. Kepner, Attorney," and also "Thomas E. Kepner," and deposited the same to his own credit in his bank and drew a check on this account in favor of Aun-Tan for $450.00, being the balance due him under the arrangement for fees in the several matters as asserted by Mr. Kepner, but denied by the prosecuting witnesses for the Government. Following the action by Mr. Kepner came the prosecution in the Court of First Instance for embezzlement or swindling. The record shows that the trial was a prolonged one and resulted in the acquittal of the defendant.

From this decision of the court the United States prosecuted an appeal to the Supreme Court of the Philippine Islands. In the Supreme Court a motion was made, and argued, to dismiss the appeal, which was overruled by the court. Thereafter the plaintiff in error applied by original petition to this court for the writ of certiorari.

The case came on for hearing in the Supreme Court of the Philippine Islands, which on the 3d day of December, 1902, announced its decision on the merits, consisting of findings of fact and conclusion of law by the court, signed by James F. Smith, one of the judges thereof, with the indorsement thereon of the Chief Justice and four Associate Justices, of their concurrence in the decision. (Rec., 11-18.)

The decision was adverse to the plaintiff in error, reversing the finding of not guilty and judgment of ac-

quittal before entered by the Court of First Instance, and condemning the plaintiff in error "to one year, eight months and twenty-one days of correctional imprisonment, together with the suspension from any public office, profession, or trade, or right of suffrage, together with the costs." (Rec., 19.) Thereupon the plaintiff in error sued out a writ of error to this court, which was granted, making the same a supersedeas.

The errors assigned are as follows:

"Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and assigns the following assignment of error, upon which he will rely upon his prosecution of the writ of error in the above entitled cause.

"I. That this court erred in entertaining an appeal by the United States from the finding of not guilty and judgment of acquittal rendered by the Court of First Instance of the City of Manila, in this cause, and that this court had no jurisdiction to entertain said appeal, or jurisdiction of this cause, for that said defendant and respondent was never legally tried in said Court of First Instance of the City of Manila, by a jury as provided in Article III, Section 2, and Amendment VI, of the Constitution of the United States.

"II. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the Court of First Instance of the City of Manila, made by said defendant on the grounds that under general orders numbered 58, office of the United States Military Governor in the Philippine Islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty, and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States,

Amendment V, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy,' which said motion was overruled by this court on the 6th day of February, A. D., 1902.

" III. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the Court of First Instance of the City of Manila, made by said defendant and respondent on the grounds that under general orders, numbered 58, office of the United States Military Governor in the Philippine Islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States, Amendment V, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy, 2 and, further, upon the ground that such appeal was prohibited by the act of Congress of the United States, entitled 'An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' which said motion was overruled by this court on the 11th day of October, A. D., 1902.

" Wherefore, the said Thomas E. Kepner, plaintiff in error, prays that the judgment of the Supreme Court of the Philippine Islands be reversed, and said cause against him be dismissed, and that he go hence without day.

"FREDERICK GARFIELD WAITE,
"Attorney for Thomas E. Kepner, Plaintiff in Error."
(Rec., 20-21.)

The alleged unauthorized and fraudulent indorsement and deposit in his own account by the plaintiff in error of the check for one thousand dollars was made on the 23d day of September, 1901 (Rec., 2). The complaint or information was filed against the plaintiff in error on the

28th day of October, 1901. The accused appeared and gave bail on the 29th of October, 1901. He was arraigned in part I of the Court of First Instance, and pleaded *not guilty* on the 13th day of November, 1901. He was tried before the Honorable Fletcher Ladd, one of the judges of the Supreme Court of the Philippine Islands, sitting as judge of said Court of First Instance, part I, without a jury, on the 15th, 16th and 18th days of November, 1901. The trial judge rendered the following decision on the 18th day of December , 1901 (Rec., 3):

> "In this case there is evidence tending to show that the money which the respondent is charged with unlawfully converting was in fact appropriated by him under a bona fide claim of right, and on the whole I think this evidence is of sufficient weight to raise a reasonable doubt as to the existence of a fraudulent intent which is an essential element of the offense. I therefore find the respondent not guilty." (Rec., 3 and 4.)

The appeal was taken in behalf of the United States on the 20th day of December, 1901. (Rec., 4.) The motion to dismiss this appeal was made in the Supreme Court of the Philippine Islands on the 9th day of January, 1902. This motion was overruled on February 6, 1902 (Rec., 6), and afterwards renewed on the 19th day of July, 1902, and overruled on the 16th day of September, 1902. The court filed its written opinion on the motion to dismiss the appeal of the prosecuting attorney on the 11th of October, 1902. (Rec., 7-11.)

The United States acquired the title to the Philippine Islands through the Treaty of Peace between the United States and Spain on December 10, 1898, and the exchange of ratifications on April 11, 1899.

The President created the Philippine Commission and gave it instructions under date of April 7, 1900, as fol-

lows (Public Laws and Resolutions of Philippine Commission, 6-9):

> "Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this commission, to be thereafter exercised by them in the place and stead of the military governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character.
>
> "The commission will also have power, during the same period, to appoint to office such officers under the judicial, educational, and civil-service systems, and in the municipal and departmental governments, as shall be provided for. Until the complete transfer of control the military governor will remain the chief executive head of the government of the islands, and will exercise the executive authority now possessed by him and not herein expressly assigned to the commission, subject, however, to the rules and orders enacted by the commission in the exercise of the legislative powers conferred upon him. In the meantime the municipal and departmental governments will continue to report to the military governor, and

be subject to his administrative supervision and control, under your direction, but that supervision and control will be confined within the narrowest limits consistent with the requirement that the powers of government in the municipalities and departments shall be honestly and effectively exercised and that law and order and individual freedom shall be maintained.

"All legislative rules and orders, establishments of government, and appointments to office by the commission will take effect immediately, or at such times as they shall designate, subject to your approval and action upon the coming in of the commission's reports, which are to be made from time to time as their action is taken. Wherever civil governments are constituted under the direction of the commission, such military posts, garrisons, and forces will be continued for the suppression of insurrection and brigandage and the maintenance of law and order as the military commander shall deem requisite, and the military forces shall be at all times subject under his orders to the call of the civil authorities for the maintenance of law and order and the enforcement of their authority. In the establishment of municipal governments the commission will take as the basis of their work the governments established by the military governor under his order of August 8, 1899, and under the report of the board constituted by the military governor by his order of January 29, 1900, to formulate and report a plan of municipal government, of which his honor Cayetano Arellano, president of the audiencia, was chairman, and they will give to the conclusions of that board the weight and consideration which the high character and distinguished abilities of its members justify. In the constitution of department or provincial governments they will give especial attention to the existing government of the Island of Negros, constituted with the approval of the people of that island, under the order of the military governor of July 22, 1899, and after verifying, so far as may be practicable, the reports of the successful working

of that government, they will be guided by the experience thus acquired, so far as it may be applicable to the conditions existing in other portions of the Philippines. They will avail themselves, to the fullest degree practicable, of the conclusions reached by the previous commission to the Philippines.

. . . . . .

"In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

By order of the President, through the Secretary of War, under date of June 21, 1901, it was provided that on and after the 4th day of July, 1901, and until it should be otherwise ordered, the President of the Philippine Commission should exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines. Such authority to be exercised under, and in conformity, to the instructions of the Philippine Commission, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the

United States. (Public Laws and Resolutions, United States Philippine Commission, p. 11.)

It is further provided:

> "The Military Governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties hereinbefore described, but his authority will continue to be exercised as heretofore, in those districts in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions of the Commission, dated April 7, 1900."

This was followed by the Act of July 1, 1902, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes." (32 Stat., 691.)

By this Act the action of the President in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form set forth in the instructions of the President before referred to, was approved and ratified, and it was provided that "until otherwise provided by law the said Islands shall continue to be governed as thereby and in said act provided."

Section 5 is as follows:

> "That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.
>
> "That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

"That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses.

"That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.

"That no ex post facto law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands, shall, without the consent of Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince or foreign State.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

"That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of

religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

"That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purposes only." (32 Stat., 692-693.)

Section 10 of this Act is as follows:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilenge of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

It thus appears that at the date when the motion to dismiss the appeal in the Supreme Court of the Philippine Islands was renewed, and at the date of the trial of the plaintiff in error in said Supreme Court of the Philippine Islands, this Act of Congress was in force.

On June 11, 1901, the United States Philippine Commission passed an act entitled "An Act providing for the organization of courts in the Philippine Islands," to take effect June 16, 1901. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 289-306.)

Sections 2, 8, 13, 14, 15, 16, 17 and 18 of this Act are as follows:

> "Sec. 2. The judicial power of the Government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and Courts of Justices of the Peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record."
>
> "Sec. 8. The Supreme Court shall consist of a Chief Justice and six Associate Judges, any five of whom when convened shall form a quorum, and may transact any of the business of the court; but in the absence of a quorum the member or members present may adjourn the court from time to time with the same effect as if all were present. The concurrence of at least four members of the court shall be necessary to pronounce a judgment. They shall be appointed by the Commission, and shall hold office during its pleasure. The word 'Judges' or 'Judges of the Supreme Court,' when used in this Act, shall include the Chief Justice."
>
> "Sec. 13. All actions coming into the Supreme Court from Courts of First Instance situated in the islands of Luzon, Mindoro, Marinduque and Paragua, shall be heard at Manila.

Those coming into the Supreme Court from Courts of First Instance situated in the islands of Romblon, Panay, Masbate and Negros, the Sulu Archipelago, and the south half of Mindanao, shall be heard at Iloilo. Those coming from the islands of Cebu, Bohol, Samar, Leyte, and the north half of Mindanao, shall be heard at Cebu. Original actions in the Supreme Court shall be filed in Manila, but may be heard at Iloilo or Cebu, if the Court shall so order.

" Sec. 14. Whenever the public good, or the convenience of individuals, or the necessity for speedy hearing, requires that any action, or any number of actions, which would by the terms of this Act be properly triable at either one of said places, should be heard at another of them, the Supreme Court may order such action or actions to be heard at either Manila, Cebu or Iliolo, as it finds most expedient, and with the same effect as though such action or actions had been heard at the place provided in the preceding section.

" Sec. 15. In the determination of causes, all decisions of the Supreme Court shall be given in writing, signed by the Judges concurring in the decision, and the grounds of the decision shall be stated as briefly as may be consistent with clearness.

" Sec. 16. The jurisdiction of the Supreme Court shall be of two kinds:

" 1. Original; and

" 2. Appellate.

" Sec. 17. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

" Sec. 18. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the

law shall specially provide an appeal to the Supreme Court."

The organization and jurisdiction of Courts of First Instance are provided for as follows:

"Sec. 48. There shall be in each province in which civil government has been or shall be organized under the sovereignty of the United States, a Court of First Instance, in each of which a judge shall preside, to be appointed by the Philippine Commission, to hold office during its pleasure. Each judge so appointed shall preside in all Courts of First Instance in his judicial district, which shall consist of such provinces as shall be hereafter by law designated to constitute such judicial district. But this section shall not apply to the province of Benguet, nor to other provinces in which a special civil government shall be organized for largely uncivilized people, nor to the City of Manila."

"Sec. 49. There shall be one Court of First Instance for the City of Manila, and two judges shall be appointed by the Commission, to serve during its pleasure, to preside in such Court in separate court rooms.

"Actions brought in the Court of First Instance for the City of Manila shall be equally apportioned for trial between the two judges, in accordance with a rule to be made by the judges of the Supreme Court. Any action apportioned to one judge may be tried by the other judge, when more convenient to the judges."

"Sec. 55. The jurisdiction of Courts of First Instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"Sec. 56. Courts of First Instance shall have original jurisdiction:

"1. In all civil actions in which the subject of litigation is not capable of pecuniary estimation;

"2. In all civil actions which involve the title to or possession of real property, or any interest therein,

or the legality of any tax, impost or assessment, except actions of forcible entry into, and detainer of lands or buildings, original jurisdiction of which is by this Act conferred upon Courts of Justices of the Peace;

"3. In all cases in which the demand, exclusive of interest, or the vlaue of the property in controversy, amounts to one hundred dollars or more;

"4. In all actions in admiralty and maritime jurisdiction, irrespective of the value of the property in controversy or the amount of the demand;

"5. In all matters of probate, both of testate and intestate estates, appointment of guardians, trustees, and receivers, and in all actions for annulment of marriage, and in all such special cases and proceedings as are not otherwise provided for;

"6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed;

"7. Said Courts and their judges, or any of them, shall have power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto and habeas corpus in their respective provinces and districts, in the manner provided in the Code of Civil Procedure."

"Sec. 57. Courts of First Instance shall have appellate jurisdiction over all causes arising in Justice's and other inferior Courts in their respective provinces."

"Sec. 65. The existing Courts of First Instance are hereby abolished, and the Courts of First Instance provided by this Act are substituted in place thereof."

It seems that at this time the United States Philippine Commission had not enacted any penal code, and we therefore turn to the Penal Code in force in the Philippines as published in June, 1900, under the authority of the Division of Customs and Insular Affairs, War Department, for a definition of the offense with which the plaintiff in error was charged (Art. 535, cl. 5, p. 108):

"The following shall incur the penalties of the preceding articles. . . . Those who to the prejudice of another shall appropriate or misapply any money, goods or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

"The penalties shall be imposed in their maximum degree in case of deposits made under stress or necessity."

Turning to the preceding articles of this Chapter IV, subject Frauds (p. 105), to which reference is here made, we find that the penalties imposed are *presidio mayor, presidio correccional* in its maximum degree, to *presidio mayor* in its medium degree, *prision correccional* in its minimum and medium degrees—*arresto mayor* in its minimum and medium degrees, if the fraud should not exceed 250 pesetas in amount—*arresto mayor* in its medium degree to *presidio correccional* in its minimum degree, if it should exceed 250 pesetas, and not be more than 6,250 pesetas—*presidio correccional* in its minimum and medium degrees if it should exceed 6,250 pesetas (Penal Code, pp. 107-108).

Turning to page 17 of this Penal Code, we find these terms defined. Assuming that a *peseta* represents about 19.3 cents, then the crime of which the defendant was accused did not warrant the penalties imposed for a fraud involving 6,250 pesetas. It was not one to be classified as a "corporal penalty."

It thus appears that we have a Penal Code promulgated by the King of Spain under a royal decree under date September 4, 1884, to be administered in territory of the United States, in courts organized by authority of the United States, with their respective jurisdictions

clearly defined; and that the punishment which the Court of First Instance was authorized to inflict upon the plaintiff in error in the event that he had been found guilty therein included a fine, imprisonment and disqualification to practice his profession; in other words, the punishment is such that in our jurisprudence the crime would be classed as a felony. The jurisdiction of the Court of First Instance to inflict this punishment or to acquit can not be challenged.

The question, therefore, resolves itself into a consideration whether or not courts organized under the authority of the United States, sitting in territory which is a part of the United States to punish infractions of a Penal Code enacted by the King of Spain, are restrained by any of those provisions of the Constitution of the United States, which in the Insular Cases were said by this Court to be limitations upon the power of Congress and assumed therein to be natural rights enforced in the Constitution by prohibitions against interference with them, or whether it becomes the duty of courts thus organized to exercise all of the powers as they were exercised by the Courts of the King of Spain, including the punishments which those courts were accustomed to inflict. It seems proper to again call the court's attention to the fact that the Court of First Instance as it existed under the laws of Spain, did not exist at the date of the commission of the alleged offense by plaintiff in error.

Inasmuch as in the discussion of this case heretofore much has been said with reference to the character and jurisdiction of the several courts of the Philippine Islands prior to the concession thereof to the United States, and to General Orders No. 58, issued by the Military Governor in the Philippine Islands, under date April 23, 1900, pre-

scribing Amendments to the Criminal Code of Procedure, I print as an appendix to this brief the decision of the Honorable Wm. J. Rohde, one of the judges of said court, in the case of *The United States* v. *Ramon Gomez Ricoy*, under date of August 20, 1903, and desire to adopt the same as a part of the statement of facts and the argument thereon in the present cause. A properly certified copy of such decision is filed with the record in this cause.

It appears from this opinion that under the Spanish regime the decision of the Court of First Instance was merely advisory, and that all questions were taken to the Supreme Court for final determination, which might adopt the conclusions of the Court of First Instance or reach its own independent conclusions; and it is apparent likewise that the Courts of First Instance as organized by the United States Philippine Commission are required to reach conclusions final in their character as distinguished from advisory conclusions, like a master in chancery or a referee.

It is likewise noticeable that in the conclusions reached by the trial judge in the case of the plaintiff in error and those reached by the Supreme Court there is a wide difference as to the facts. In neither case was there any opportunity for trial by jury, nor does the record show that there was any waiver of the right to trial by jury, if indeed such a waiver could be made even in that jurisdiction.

BRIEF.

I.

Any discussion of the practice with reference to appeals in criminal cases in the Spanish Courts of First Instance, or the effect of General Orders Number 58, is rendered unnecessary because:

(*a*) The General Orders must be deemed superseded by the orders of the President to the Philippine Commission dated April 7, 1900. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 5-11.)

(*b*) The Courts of First Instance as existing under the King of Spain were abolished by the act of the Philippine Commission taking effect June 11, 1901. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 289-301.)

(*c*) The instructions of the President which forbade that a person accused of crime should be twice put in jeopardy were ratified and approved by Congress in the Act of Congress of July 1, 1902. (32 Stat., 691.)

(*d*) Article V of the amendments to the Constitution of the United States forbids that any person shall be subject for the same offense to be twice put in jeopardy of life or limb.

(*e*) In the organization of Courts of First Instance under the act referred to and the provisions concerning appeals therefrom, no attempt is made to confer the right of appeal in a criminal case upon the United States.

II.

Those natural rights embraced in the Constitution by prohibitions against interference with them, which are

peculiar to Anglo-Saxon jurisprudence, and which are safe-guarded by the first ten amendments to the Federal Constitution, appertain to persons not members of the military service residing in the Philippine Islands. These amendments operate as limitations upon the power of Congress everywhere and prevent Congress or any one acting under the authority of the United States from denying to citizens of the United States residing in the Philippine Islands, the rights guaranteed thereby.

Downes v. *Bidwell*, 182 U. S., 244, 283, 294.
Ex parte Milligan, 4 Wall., 2.
Dred Scott v. *Sanford*, 19 How.,398, 450.
Fong Yue Ting v. *United States*, 149 U. S., 716, 738.
Pollard v. *Hagan*, 3 How., 212, 230.
Leitensdorfer v. *Webb*, 20 How., 176.
Murphy v. *Ramsey*, 114 U. S., 44, 45.

III.

Under our system of jurisprudence the United States have no right of appeal in a criminal case, and the language of the Constitution embodied in the President's instructions and the Act of Congress must be so construed as to deny this right in the Philippine Islands.

United States v. *Sanges*, 144 U. S., 310, 312.
Sparf and Hansen v. *United States*, 156 U. S., 51, 87, 175, 176.
United States v. *Ball*, 163 U. S., 662, 671.

These cases and the following show that there can not be a "double jeopardy" under any circumstances.

Ex part Lange, 18 Wall., 163, 172.
Berkowitz v. *United States*, 93 Fed., 452.
In re Belt, 159 U. S., 95, 98.

Ex parte Mason, 105 U. S., 696, 699.
Murphy v. *Massachusetts*, 177 U. S., 155.
Kohlheimer v. *State*, 39 Miss., 548.
State v. *Ward*, 48 Ark., 36.
Black v. *State*, 36 Ga., 447.
Hilands v. *Commonwealth*, 111 Pa. St., 1.
State v. *McKee*, 1 Bailey (Law), 651; s. c. 21 Am. Dec., 499, with notes.
Commonwealth v. *Fitzpatrick*, 121 Pa. St., 109.
McDonald v. *State*, 79 Wis., 651.
O'Brian v. *Commonwealth*, 9 Bush., 333.
Durham v. *State*, 4 Scam., 172.

IV.

The intervention of a jury is not important. It is sufficient if the court had jurisdiction. Nor is it true as stated by the Supreme Court of the Philippine Islands that "Jeopardy is not the peril of more than one trial, but the peril of more than one punishment." Cases last cited, and *Coleman* v. *Tennessee*, 97 U. S., 509; *People* v. *Miner*, 144 Ill., 308; *United States* v. *Ball.*, 163 U. S., 662.

V.

It is conceded that while a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless. *New Orleans* v. *Steamship Company*, 20 Wall., 387, 394.

But when the war is ended and the military government ceases to be an instrument to promote actual war-

fare and devotes itself simply to civil affairs instead of military affairs, the limitations of the Constitution at once apply. This follows from the well-settled doctrine that a military government is the creature of necessity, and its acts must be justified by necessity. *Ex parte Milligan,* 4 Wall., 2, 127; *Raymond* v. *Thomas,* 91 U. S., 712.

VI.

It is also established that upon the cession of the Philippine Islands to the United States all of the laws of the former sovereignty which were incompatible with the character and institutions of our Government became of no effect.

Chi., R. I. & P. Ry. Co. v. *McGlinn,* 114 U. S., 542, 546.

Am. Ins. Co. v. *Canter,* 1 Pet., 542.

More v. *Steinbach,* 127 U. S., 70, 80.

ARGUMENT.

In the argument of the question involved in this record there will be no attempt to re-argue the questions settled by the decisions in the so-called Insular Cases. (*De Lima* v. *Bidwell,* 182 U. S., 1; *Downes* v. *Bidwell,* 182 U. S., 244; *Dooley* v. *United States,* 182 U. S., 222; *Dooley* v. *United States,* 183 U. S., 151; *14 Diamond Rings* v. *United States,* 183 U. S., 176.) We therefore assume as the result of these cases that the Philippine Islands became from and after the treaty of Paris territory of the United States, although not an organized territory in the technical sense of the word. As stated by the court in the 14 Diamond Rings Case (183 U. S., 176, 179):

> "The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection."

It will be remembered that upon the argument of these cases counsel for the plaintiffs in error called attention to those great provisions of the Constitution embraced in the first ten amendments and constituting a Bill of Rights, and urged upon the court that if the contentions of the government were sustained it would be possible for Congress in the Philippine Islands, as had been suggested by ex-President Harrison in a public address, to permanently

suspend the writ of habeas corpus, to pass bills of attainder against all who had displayed the Spanish flag, to create orders of nobility, to prescribe cruel and unusual punishments, to establish a church and prohibit the worship of God in any other form, to submit press publications to a censorship, prohibit public meetings for the discussion of public affairs, the presentation of petitions to the government to quarter soldiers upon the people, to issue warrants without probable cause and unsupported by oath or affirmation, to hold persons to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury, to place persons twice or more times in jeopardy for the same offense, to compel the accused to be a witness against himself, to deprive persons of life, liberty, or property without due process of law, or take private property for public use without just compensation.

The then Attorney-General had the courage of his convictions and in answer to interrogatories propounded by the members of the court stated that in his opinion it would be competent for Congress to establish orders of nobility or decree an established church in these islands; and necessarily he must thus have answered, had he been particularly interrogated, with reference to all of the rights guaranteed by the first ten amendments.

It is thought that language found in the opinions of the court upon these subjects must be read in the light of this discussion and these contentions in behalf of the United States. In the Downes case, at page 282, the court says:

> "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are pe-

culiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage *Minor* v. *Happersett*, 21 Wall., 162, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regared as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States." Citing cases. "We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

Later, in the same case, in a concurring opinion, Mr. Justice White says (page 294):

> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

The dissenting opinions in other cases express the same conclusion; and the profession has generally accepted the decisions in the Insular Cases as establishing contrary to the contentions of the United States, that the territory ceded to the United States by Spain under the Treaty of Peace of December, 10, 1898, and the exchange of ratifications thereof on April 11, 1899, became thereby an integral part of the United States, and that the limitations upon the power of Congress embodied in the first ten amendments must be deemed limitations upon such power wherever exercised; and likewise as holding contrary to the contentions of plaintiffs in error that clause 1 of section 9, article I of the Constitution of the United States did not prevent the imposition of duties upon imports from these islands into the United States.

In answer to the petition for certiorari in this case it was contended in behalf of the United States that the prohibition against placing any person twice in jeopardy of life or limb for the same offense must be construed in ac-

cordance with the Spanish meaning of "double jeopardy." Counsel for the United States said:

> "The Constitution and the general laws of the United States not being in force in the Philippine Islands, the requirements of 'due process of law' and 'equal protection of the laws' in Section 5 of the Act of July 1, 1902, must, of necessity, mean process and protection according to the laws that are in force there. So, too, the provision of Section 5 that 'no person for the same offense shall twice be put in jeopardy of punishment,' must mean jeopardy attaching under the law of the Philippine Islands, and not under the law of the United States."

It necessarily follows if this construction is adopted that the other provisions of Section 5 quoted above are to be construed in the same manner, and that the question of what shall be deemed a deprivation of life, liberty or property without "due process of law" or a denial to any person of the "equal protection of the laws" is to be measured by the standard of the Spanish Penal Code and not by the interpretation given to these clauses of the Federal Constitution thus re-enacted.

The same rule would apply to the requirement of excessive bail, or the imposition of cruel and unusual punishments, equally forbidden by the Constitution and the language of which is re-enacted in the section referred to; and we would have the government of the United States maintaining that these provisions mean an entirely different thing in the unorganized territories acquired through the Treaty of Peace with Spain than they have been held to mean in the States and the organized Territories, viz.: safeguards to personal liberty and restraints upon the power of Congress; then if the punishment is not cruel and unusual as tested by Spanish law, it neither infringes the Act of Congress nor the provisions of the

Federal Constitution. To such unfortunate conclusions, inimical to liberty, does the construction there contended for and adhered to by the Supreme Court of the Philippine Islands necessarily lead us.

In behalf of the plaintiff in error it is contended that all of these provisions of the Constitution thus re-enacted in the Act of July 1, 1902, must be held to have the meaning that they have acquired in our own jurisprudence and which has grown out of the conflict between the people and those in power from the date of Magna Charta. The results of this conflict were embodied in these provisions of the Constitution, and it must be deemed, as is contended for plaintiff in error, so far a part of our fundamental law that even in the absence of constitutional provision these natural rights of man could not be infringed upon in territory of the United States.

During military occupation of a territory the laws of war must prevail and of course the constitutional provisions applicable in time of peace cannot be appealed to. Otherwise the power to wage war under conceivable circumstances might be rendered nugatory or at least greatly crippled.

This war power is exercised under the Constitution and not in violation thereof. This is but an illustration of that general rule of construction, that where a power is clearly granted it necessarily carries the implied powers necessary to make the granted power effectual.

Does it therefore follow that if the main purpose sought is within a granted power, that purpose may be pursued even though in its pursuit other acts forbidden by the constitution may become necessary?

Some publicists have answered this question in the affirmative and it is probably true that language may be

found in judicial opinions giving aid and comfort to the supporters of this view. The cases where the prosecution of a purpose under a conceded power has infringed upon other provisions of the Constitution are within exceptions found in the Constitution itself (*Ex parte Milligan*, 4 Wall., 2), or are authorized thereby. The power to make war authorizes the President as Commander in Chief to prosecute war and cause arrests, searches, seizures, and trials to be had that in time of peace would be unwarranted under the Constitution. The Fifth Amendment contains exceptions warranting some of these acts. Others must be derived from the grant itself of the power to make war and the meaning of this term among civilized nations. The extent to which a purpose may be pursued under a granted power should be defined by Congress, otherwise the power may easily become despotic resting only in the discretion of the officers or agents of government. This was the theory of the founders of the Constitution in giving to Congress the power to make all laws necessary and proper to carry into execution all powers vested in the Government of the United States or any Department or officer thereof, and is further evinced by the fact that many of the so-called war powers vesting under other forms of government in the King or Emperor are by the Constitution expressly granted to Congress (Art. 1, Sec. 8, Cl. 10-16).

All acts are done, and must necessarily be done, under the Constitution, else such acts are unwarranted and unlawful. The United States as a nation exists under and by virtue of the adoption of that instrument and without it we cannot conceive its existence, in its present form. Its agents are such through the Constitution and laws of Congress enacted thereunder, and can only exercise powers

as such agents by virtue thereof. As was said by Chief Justice Marshall "This Government is acknowledged by all to be one of enumerated powers" and it is equally true that it is one of prohibited powers.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

By the treaty of peace of December 10, 1898, and the exchange of ratifications April 11, 1899, the territory known as the Philippine Archipelago ceased to be Spanish territory and became domestic territory, a part of the United States.

It is conceded that the military government during its occupation of conquered territory "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war" (*Dooley* v. *United States*, 182 U. S., 222, 231), and that "the municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror." . . . He nevertheless, has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones." (Id., p. 231.)

This general language must be limited in the case of ceded territory where hostile force no longer exists so that municipal laws utterly at variance with our institutions can neither be continued nor made and enforced by the military governor.

As stated in the case last cited, the power of the military authority "to administer cannot be absolute, but his power to legislate would not be without certain restrictions—in

other words, they (it) would not extend beyond the necessities of the case." The cases are to the effect that "it is an unbending rule of law, that the exercise of military power where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires;" and in the case of *Cross* v. *Harrison*, 16 How., 174, 185, in the instructions of the Secretary of State to Mr. Voorhees, approved by the court in its opinion, it is said that this *de facto* government made necessary by the situation of a conquered people "will of course exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land." And in *Ex parte Milligan*, 4 Wall., 2, it is held that the guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances, and that neither the President nor Congress nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus, and that a citizen not connected with the military service and resident in a state where the courts are open and in the proper exercise of their jurisdiction, cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted or sentenced otherwise than by the ordinary course of law.

It has been clearly decided that the Congress of the United States has not the power to deny to citizens thereof residing in the territories these constitutional safe-guards which have been so often pronounced essential to liberty and a necessary part of our institutions.

As said in *Dred Scott* v. *Sanford*, 19 How., 398, 450:

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers."

In *Fong Yue Ting* v. *United States*, 149 U. S., 716, 738, the court said:

"The Constitution has potency everywhere within the limits of our territory, and the powers which the National Government may exercise within such limits are those, and only those, given to it by that instrument."

In *Pollard* v. *Hagan*, 3 How., 212, 225, the court said:

"It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it."

And in *Leitensdorfer et al.* v. *Webb.*, 20 How., 176, 177, it is said:

"Although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their

> former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain."

In *Murphy* v. *Ramsey*, 114 U. S., 15, 44-45, the court after discussing the relation of the government to the territories, said:

> "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of Government, State, and nation;" citing authorities. *Callan* v. *Wilson*, 127 U. S., 540, 549, 551. See also *Springville* v. *Thomas*, 166 U. S., 707, 708; *American Pub. Co.* v. *Fisher*, 166 U. S., 464, 466.

It is, however, unnecessary to make an extended investigation of the rights or powers of a *de facto* government existing in conquered or ceded territory after the cessation of hostilities and the return of peace, pending the action of Congress, and the powers of such government with reference to the prohibitions of the Constitution of the United States. This arises from the fact that at the date of the commission of the alleged offense the treaty had not only been made and the ratifications exchanged, but the civil authorities had been re-established in the City of Manila, and there had been enacted an act entitled "An Act providing a Code of Procedure in civil actions and special proceedings in the Philippine Island." (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 425-581.) It was provided that this act should take effect on the first day of September, 1901. The military power had been superseded by

the civil power. The Spanish courts had been abolished and courts organized under the authority of the Congress of the United States established in their place. It is unnecessary because neither the President, acting as Commander-in-Chief, in his instructions looking to the organization of the Philippine Commission, nor Congress in ratifying the action of the President, has attempted to perpetuate the rule of the Spanish courts, by which a man may be put in jeopardy two or more times, subjected to cruel and unusual punishments, or be deprived of his life, liberty or property without due process of law. As has been noted, in his instructions, the President embodied the principles of the first ten amendments to the Federal Constitution, as an inviolable rule of action on the part of the authorities of the United States in the Philippine Islands. This was prior to the commission of the offense, and Congress, after the commission of the offense but prior to the second trial of the plaintiff in error, had not only formally approved and ratified the action of the President, but had likewise embodied the principles of the ten amendments in the act as the Bill of Rights for the inhabitants of these islands. If, therefore, there may be two trials before a court competent to condemn and punish in a criminal case in the Philippine Islands, it is because the Spanish rule with reference to criminal procedure obtains, contrary to the President's instructions as Commander in Chief, and contrary to the will of Congress as expressed in the act of July 1, 1902.

It remains to consider whether or not two trials in a criminal case are consistent with the prohibition against double jeopardy in the Federal Constitution.

In *United States* v. *Sanges*, 144 U. S., 310, a demurrer

had been sustained and the indictment quashed. The United States sued out a writ of error upon the ground that under acts of Congress (26 Stat. 827, 828), such writ was authorized "in any case that involves the construction or application of the Constitution of the United States."

After announcing the well known rule of construction that "this statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law from which our jurisprudence is derived," and calling attention to the fact that the law in England upon the subject is not free from doubt, cites certain cases showing that such right had at times been assumed by the representatives of the Crown, though in none of them was the right suggested or considered by court or counsel, this court says (p. 312):

> "From the time of Lord Hale to that of Chadwick's case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, Sec., 12; c. 50 Sec., 10 *et seq.*; Bac. Ab. Trial, L. 9; Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 179.
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> "But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

Then follows an exhaustive review of the decisions in the State and Federal courts, which forecloses any dis-

cussion of the right on the part of the United States to a writ of error in a criminal case.

In *Sparf and Hansen* v. *United States,* 156 U. S., 51, 87, 175, 176, it is assumed in both the majority and minority opinions that an acquittal is final and that a writ of error lies only in behalf of the defendant.

In *United States* v. *Ball,* 163 U. S., 662, one of the plaintiffs in error had been acquitted upon trial upon a defective indictment; his co-defendants upon this trial, who were found guilty, succeeded in securing a reversal for this defect; whereupon all three were again indicted, put upon trial and convicted. A writ of error was taken to this court, which brought before it the effect of the acquittal as to one of the plaintiffs in error. The court said (pp. 669, 670):

> "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters,* 12 Met. 387; 2 Hawk. P. C. c. 35, Sec. 3; 1 Bishop's Crim. Law, Sec. 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of habeas corpus. *Ex parte Parks,* 93 U. S., 18. If the judgment is

upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States* v. *Sanges*, 144 U. S., 310. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case." . . .

Page 671:

"As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States* v. *Sanges*, 144 U. S., 310; *Commonwealth* v. *Tuck*, 20 Pick., 356, 365; *West* v. *State*, 2 Zabriskie (22 N. J. Law) 212, 231; 1 Lead. Crim. Cas. 532.

"For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal."

The instructions of the President as well as the Act of Congress of July 1, 1902, provided that "no person for the same offense shall be twice put in jeopardy of punishment" (32 Stat., 691); thus being in terms milder than the constitutional provision. This court, adopting Mr. Bishop's views, has held, however, that although the constitutional provision does not in terms embrace misdemeanors, "yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime" the courts cannot refuse to apply this constitutional guarantee in cases of misdemeanor.

(*Ex parte Lange*, 18 Wall., 163, 172.) To the same effect is *Berkowitz* v. *United States*, 93 Fed., 452. We assume therefore that the words of the Constitution, the instructions to the Commission, and of the Act of Congress, are equivalent or identical in meaning.

The distinction drawn in *Ex parte Lange*, 18 Wall., 163, 173, 174, rests upon the validity or invalidity of the first trial, verdict or sentence. If these are absolutely void, "so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force," it is intimated, though not decided, that the plea of former jeopardy might not prevail. It is clearly held that where the action of the court is not void, where the court has jurisdiction of the party and of the offense, the case is within the constitutional prohibition.

In that case the court had the power to fine or imprison. The sentence was one year's imprisonment and to pay two hundred dollars fine. After five days of imprisonment the fine was paid and habeas corpus sought. The court said (p. 176):

> "That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to

> punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

The Court of First Instance had jurisdiction to try the plaintiff in error for the offense charged; whether under the Constitution this should have been done without the intervention of a jury is not important so far as the question of double jeopardy is concerned. This is illustrated by the case of *Coleman* v. *Tennessee*, 97 U. S., 509. The conclusion there reached was based upon the fact that Coleman at the time he was alleged to have committed the offense for which he was tried and convicted by court martial, was in the military service of the United States; as such he was not amenable to the jurisdiction of the civil authorities of the State of Tennessee. Had he been a private citizen not connected with the military service, the courts of that State could have exercised their ordinary jurisdiction. The sentence of death by the court martial had not been executed; when therefore after the constitutional relations of the State of the Union were restored he was indicted for the same murder and pleaded his conviction before the court martial, he was again put in jeopardy, and this court ordered his release and discharge contrary to the opinion of the Supreme Court of the State. The plea was treated as a plea to the jurisdiction. There had been no jury trial, and no punishment. The military court had jurisdiction which made jeopardy. This is the test recognized. *In re Belt*, 159 U. S., 95, 98; *United States* v. *Ball*, 163 U. S., 662, 669; *Ex parte Mason*, 105 U. S., 696, 699; *Murphy* v. *Massachussetts*, 177 U. S., 155; *Kohlheimer* v. *State*, 39 Miss., 548; *State* v. *Ward*, 48 Ark., 36; *Black* v. *State*, 36 Ga., 447; *Hilands* v. *Commonwealth*, 111 Pa. St., 1; *State* v. *McKee*, 1 Bailey

Law, 651, s. c. 21 Am. Dec., 499, with notes; *Commonwealth* v. *Fitzpatrick*, 121 Pa. St., 109; *McDonald* v. *State*, 79 Wis., 651; *O'Brian* v. *Commonwealth*, 9 Bush., 333; *Durham* v. *State*, 4 Scam., 172.

These cases show that while there is not a unanimity of decision as to the precise moment when jeopardy attaches, there is substantial unanimity that where the indictment or information is sufficient and the defendant is acquitted in a court having jurisdiction, he cannot be called upon to again answer for the same offense.

In *The People* v. *Miner*, 144 Ill., 308, we find a pertinent illustration of this rule. The legislature had enacted "that any defendant who may be convicted, or in case of acquittal the party making the complaint, or any person who will give the necessary bond, shall have the right of appeal on the same terms as in civil cases before justices." The defendants were arrested for illegally catching and killing fish with a seine, contrary to the statute of the State. They were acquitted before the justice of the peace, and an appeal was taken pursuant to the terms of the statute. In the Circuit Court this appeal was dismissed for the reason that the action was a criminal action and it was beyond the power of the legislature of the State to grant the right of appeal to the prosecution upon acquittal under the constitution of that State (Sec. 10, Art. 2) providing that no person shall be twice put in jeopardy for the same offense.

The court said (p. 311):

> "The defendants having been arrested for a criminal offense, tried before a court of competent jurisdiction, can they, on the application of the people, be tried a second time? This is forbidden both by the common law and our Constitution and cannot be done. In Wharton's American Criminal Law, Vol. 1,

Sec., 573, after referring to the provision in the Federal Constitution, to the effect that no person shall be subject for the same offense to be twice put in jeopardy, the author says: 'Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit* has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation. It has, therefore, been generally agreed that where a man has once been pronounced not guilty on a valid indictment or appeal he cannot afterwards be indicted again upon a charge of having committed the same supposed offense. At common law, as has been seen, it means nothing more than that where there has been a final verdict either of acquittal or conviction on an adequate indictment the defendant cannot a second time be placed in jeopardy.' The question in a somewhat different form was before this court at an early day in *The People* v. *Dill*, 1 Scam., 257, where the defendant had been indicted for selling liquor without a license. A trial was had and defendant acquitted. The State's Attorney, in behalf of the people, excepted and sued out a writ of error. The defendant appeared and moved to dismiss the writ of error for the want of jurisdiction, and the motion was sustained and the writ of error dismissed. The same question arose in *The People* v. *Royal*, 1 Scam., 557. There the defendant had been tried and convicted for an assault and battery before a justice of the peace. On appeal by the defendant to the Circuit Court the judgment of the justice was reversed and the defendant discharged. The people sued out a writ of error and the court dismissed it on its own motion, and in deciding the case said: 'The Constitution of this State . . . has declared that no person shall for the same offense be twice put in jeopardy, . . . or, in other words, that he shall be again tried for the same offense after an acquittal. . . . It is manifest that in such a case this court has no juris-

> diction over the cause, and that even a reversal of the judgment of the Circuit Court could not be of practical utility.' It will be observed that both of the cases cited, like the one here involved, were misdemeanors. The doctrine is, therefore, applicable to misdemeanors as well as felonies. The language of our Constitution on this point is plain: 'No person shall be twice put in jeopardy for the same offense.' Where there has been a trial and conviction or acquittal for a criminal offense, regardless of the magnitude of the crime, the Constitution applies."

The Courts of First Instance under the Spanish regime were merely advisory. It seems that every action taken therein was interlocutory in its character. Any discussions as to the practice in those courts prior to the cession to the United States and the exchange of ratifications seems unnecessary in view of the fact that prior to the commission of the alleged offense by the plaintiff in error these courts had been abolished and courts of another character though bearing the same name instituted. This is illustrated by Sec. 123 of "An Act providing a Code of Procedure in Civil Actions and Special proceedings in the Philippine Islands which took effect Sept. 1, 1901." (Public Laws and Resolutions United States Philippine Commission, p. 447.)

> "No interlocutory or incidental ruling, order or judgment of the Court of First Instance shall stay the progress of an action or proceeding therein pending, but only such ruling, order or judgment as finally determines the action or proceeding; nor shall any ruling, order or judgment be the subject of appeal to the Supreme Court until final judgment is rendered for one party or the other."

In the act of June 11, 1901, entitled "An Act providing for the organization of courts in the Philippine Islands," it is provided (Laws, etc., Philippine Commission, p. 292)

Sec., 18: "The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court." There is no authorization of an appeal or writ of error in a criminal case on the part of the United States in this act or any other act of the Commission.

The right to such writ rests wholly upon an implication that because the United States Court of First Instance is administering a penal code ordained by the King of Spain and under the code the Court of First Instance was only advisory and such appeal was allowed, therefore is still permissible. The cases cited show that such intendments are not indulged in as against liberty.

Under the authorities cited it would not have been competent for the Commission, the President or Congress to have authorized such writ of error upon acquittal of the person accused. Fortunately for the honor of the nation professing to be in the Philippines engaged in the benign mission of civilization and teaching self-government, no attempt was made to thus disregard our fundamental law; on the contrary the President, the Commission and Congress all repeated these words of the Constitution which forbids that a person accused shall be placed twice in jeopardy; whether there by the order of the President as Commander-in-Chief, by Act of Congress, or because the Constitution in these first ten amendments acts as a limitation upon the powers of the United States wherever exercised is immaterial. The prohibitions are there in any event, furnishing object lessons to the oppressed and ignorant of the rights of the people as recognized under our institutions, rights so well established here that this

court has spoken of them as the natural, inalienable rights of man.

The absence of a jury trial in either the Court of First Instance or Supreme Court is likewise assigned for error. With reference to this assignment it is to be noted that in the Instructions of the President to the Philippine Commission he said:

> "Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:
>
> "That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed." (Public Laws and Resolutions, United States Philippine Commission, pp. 8-9.)

In the Act of Congress, July 1, 1902, approving the act of the President and ratifying the same in all respects, as well as providing for the future government of these islands, it was likewise provided that no law should be enacted in said islands depriving any person of life, liberty, or property without due process of law, and that in all criminal prosecutions the accused should enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and that no person should be held to answer for a criminal offense without due process of law, or for the same offense be twice put in jeopardy of punishment, or compelled to be a witness against himself. This section has been set forth at length in the statement of facts in this brief.

It is to be noted that the language of the fifth and sixth amendments to the Constitution requiring the presentment or indictment of a grand jury, and that this speedy and public trial shall be by an impartial jury of the State and district wherein the crime shall have been committed, and which district shall have been previously ascertained by law, is omitted both from the instructions of the President and of the Act of Congress. The inquiry, therefore, arises whether it was competent for Congress thus to omit them, thus limiting the speedy and public trial to a trial before a judge without the intervention of a jury, and enabling it to be held at a point hundreds of miles from where the crime was committed. We submit that under the previous decisions of this court in the Insular Cases it was not competent for either the President or Congress thus to provide. For example, Mr. Justice

White, speaking for the dissenting members of the court in *Downes* v. *Bidwell*, 182 U. S., 244, 294, says:

> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

That this was likewise the opinion of the majority of the court is shown by the quotation which we have already made therefrom, found at page 282 of the same case. As this offense was committed and trial had after the supremacy of the civil authorities had been established in this part of the Philippine Islands, and after the Spanish courts had been abolished and courts of the United States, using that term in the broadest sense, had been established, it follows that the trial should have been had with the aid of a jury. *Callan* v. *Wilson*, 127 U. S., 540; *Reynolds* v. *United States*, 98 U. S., 145, 154; *Thompson* v. *Utah*, 170 U. S., 347; *American Publishing Co.* v. *Fisher*, 166 U. S., 467; *Maxwell* v. *Dow*, 176 U. S., 581; *Capital Traction Co.* v. *Hof*, 174 U. S., 5.

It may be said that the record fails to show that the plaintiff in error demanded a jury or objected to the trial proceeding without the intervention of a jury. This is

conceded, but it is submitted that it does not follow from this fact that he waived the jury. It may be doubted whether such waiver could be made; at least, it is not to be held that it arises from the circumstances referred to, as would perhaps be the effect of such conduct in a civil case. (*Cancemi* v. *People*, 18 N. Y., 128.)

If, as held by the court in the Insular Cases, these prohibitions operate as limitations upon the authority of Congress and every agency of the government everywhere, there can be no question of personal waiver. It was unlawful to constitute courts without complying with the constitutional requirements.

We therefore respectfully submit that the action of the Supreme Court of the Philippine Islands in convicting the defendant should be reversed on the ground that having been acquitted in the Court of First Instance in that island, he could not lawfully be again placed in jeopardy for the same offense, and that he could not be tried without the intervention of a jury.

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APPENDIX.

UNITED STATES OF AMERICA, PHILIPPINE ISLANDS.
IN THE COURT OF FIRST INSTANCE FOR THE CITY OF MANILA.

The United States *vs.* Ramon Gomez Ricoy. } No. 7 Estafa.

SENTENCE.

Prosecution for the crime of estafa, begun in the Court of First Instance by Lucio Angeles, private prosecutor, under the old Spanish procedure.

On June 15th, 1900, the Fiscal, in pursuance of Order No. 58, filed a complaint in the following words: The undersigned promotor fiscal accuses Ramon Gomez Ricoy, in case No. 7 of this year, of the crime of estafa, committed as follows:

> "That the said Ricoy, as inspector of a salon of recreation in the Spanish Casino, received from Lucio Angeles on the 4th of January last, the sum of 39,300 pesos in chips and notes, which were used in said establishment as representatives of value, the said Ricoy being bound to deliver to said Angeles an equal amount in current money, he having delivered to said Angeles his due bill in favor of said Angeles for said amount; and on the said Angeles going to the Casino on the 8th day of the same month to collect the amount of said due bill, the said Ricoy, having asked possession of said due bill under the promise of paying the same, disappeared therewith, and gave to Manual Lobaton, an employee of said Casino, a letter directed to said Angeles, which letter is on file in Case No. 7."

The letter referred to is an insulting one, directed by

said Ricoy to said Angeles, and the complaint ends by charging that the secreting of the said due bill by the said Ricoy, constitutes the crime of estafa in fraud of the said Angeles.

On May 30, 1901, the Judge of the Court of First Instance, being of opinion that the due bill secreted and destroyed by the accused, Ricoy, had been given for a gambling debt, and was invalid, and that the destruction thereof did not constitute a crime, acquitted the defendant. The case having been appealed to the Supreme Court, the acquittal made by the Court of First Instance was set aside, and the case remitted to the Court of First Instance, with directions to take further evidence therein, beginning where the taking of the evidence was closed at the former hearing of the case in this court.

The facts as they appear from the evidence taken at the former hearing, before Judge Memijo, on file in this case, and from the evidence taken in pursuance of the order of reversal of the Supreme Court, are substantially as follows:

On January 3, 1900, at 2 o'clock in the afternoon, a gambling game of Monte began in the Spanish Casino of Manila, which lasted until 7 o'clock of the morning of the following day. In this game Lucio Angeles, the private prosecutor, was banker, and Ramon Gomez Ricoy, and numerous others, were players. During the game, as was customary in the Casino, the players used chips and due bills, issued by the Casino and signed by the accused, Ricoy, which were given to the players in return for cash and on credit for due bills issued by the players. The chips were worth from five to one hundred pesos each, and the due bills of the Casino were of the value of one thousand pesos, and these circulated in the Casino, and

sometimes on the Escolta, and were exchanged in the Casino for cash by the person in charge of the gambling apparatus, tools, and implements, which was either the accused, Ricoy, or one Manual Lobaton. The said Manual Lobaton was an employee of the Casino, and was in charge of the accounting of the gambling games, but it seems that he could not issue any chips, or the due bills of the Casino without express authority from the accused, Ricoy, who had charge of all matters pertaining to the game.

When, on the morning of the 4th, the clearing house operations had been performed, that is the checks, chips and due bills upon the gambling table had been liquidated between the players and the banker, Lucio Angeles, it was found that the banker was a winner to the extent of 39,000 pesos worth of circulating medium on the gambling table. It is not absolutely clear whether the accused was a loser to exactly the same amount or not. He had lost at least nearly that sum. There is evidence tending to show that several other players had also lost by the game. The accused, as stated, being an employee of the Casino, and a player and a heavy loser at the game, instead of paying the amount he had lost directly to the gambling department of the Casino, agreed with the said Angeles to pay to the said Angeles the amount the latter had won, and gave a due bill for that amount to the said Angeles. It does not appear satisfactorily whether he signed this due bill as his personal obligation, or as the obligation of the Casino. There is evidence tending to show that one of the other losers paid the amount of their loss afterwards to the said Ricoy, to the amount of one thousand pesos.

The prosecutor, Angeles, received on the amount of his

winnings several thousand dollars in cash, soon after the game. About a week after the game the accused sent word to Lucio Angeles to come to the Casino, and upon the said Angeles coming there, asked him whether he had brought the due bill for the amount of his winnings. The said Angeles gave the said Ricoy the due bill, with the understanding that the latter would pay the same at once, but the said Ricoy instead of paying the due bill, retired to a room and sent the said Angeles an insulting note, and has never returned the due bill.

During the proceedings had in the court of First Instance, in pursuance of the order of the Supreme Court, the question has arisen whether such proceeding is the old trial continued, a new trial, or partly both; and also whether the accused has already been duly acquitted. To treat of these questions satisfactorily will necessitate an examination of the Court of First Instance and of the Audiencia, and their respective jurisdictions under the Spanish Government, and an examination of the constitution and jurisdiction of the Court of First Instance and of the Supreme Court of the Philippine Islands, as at present constituted. It will likewise involve an investigation of the procedure in force during the Spanish regime in these Islands, as well as an examination of the changes that have been made in that procedure in the Philippine Islands.

The organic law of the courts of the Spanish colony was approved and promulgated on the 5th day of January, 1891. By section 20 of that law were constituted the Audiencias of Manila and Cebu. By the third paragraph of Section 22 is was ordained that the Courts of First Instance should remain as theretofore constituted in the Philippine Islands. Afterwards there was also constituted

the Audiencia of Vigan, and at the time of American occupation there were acting in the Philippine Islands the three Audiencias of Manila, Cebu, and Vigan.

In determining the jurisdiction of the Court of First Instance, section 185 of the organic law provided:

> "It shall be the duty of the Judges of the Court of First Instance and Jueces de Instruccion to perform all duties in civil cases expressly given them by the law, and by commission in particular cases directed to them by the respected Audiencias. Second: To prepare the sumaria in all criminal cases, and other matters which the Audiencias may confide to them. In civil and criminal matters they shall perform such other duties as the Audiencias or other judges may require of them."

Let it be noted that the functions of Courts of First Instance were to a considerable degree controlled by the Audiencias.

The word "sumaria" used in this paragraph, is not susceptible of a translation into the English language, for the simple reason that what, in a criminal prosecution, is termed the "sumaria," under the Spanish procedure, is not known in England or the United States; and, therefore, for an understanding of what that duty was, i. e., to prepare the sumaria, it will be necessary to look into the Spanish procedure for its meaning.

In determining what the Spanish procedure was in these islands, at the time of the occupation of these islands by the American forces, we have:

First.—The Compilacion Reformada, published in 1880, and

Second.—The provisional law, containing 95 articles in force and effect in these islands since the 19th day of December, 1896.

The provisional law states in its last section: That the

law of procedure in force in the Peninsula shall be regarded as suppletory and doctrinal for the application of the penal laws of the Philippine Islands. We must, therefore, first look to what was the constitution of the courts of Spain, and the procedure which they followed. The constitution of the courts of Spain, so far as it is here concerned, is as follows:

In each circumscription there is a judge of Instruction (Juez de Instruccion), in each District there is an Audiencia, and there is the Supreme Court of Spain.

The Judge of Instruction is a judge charged with the preparation of the sumaria, which is the beginning of a criminal prosecution, up to the stage when it is called the plenaria, or when, in Spain, begins the juicio oral. When a complaint is made to a judge of Instruccion, he begins an investigation of the crime charged, and as soon as he determines that a crime has been committed and that the author of the crime is known, he may order his arrest, and if the crime is a grave one he must order his arrest. The case then proceeds without any intervention of the defendant, unless by special leave, until all the evidence which the prosecution may deem necessary to introduce has been introduced. Then the Fiscal, or Prosecuting Attorney, presents his opinion to the Court, as to what crime, in his opinion, has been committed from the testimony introduced; and the Court then determines what crime was committed, and who is prima facie responsible for the commission thereof. Then begins the defense, and the accused must virtually prove his innocence, if, during the sumaria, guilt has been shown.

In Spain, defendants accused of grave crime are entitled to a hearing before a jury. This hearing, however, is not had before the judge of Instruction who prepared the

sumaria, but is held before the Audiencia to which the sumaria is remitted. The Audiencia determines the guilt or innocence of the accused, with the assistance of the jury. From the judgment of the Audiencia there is no appeal to the Supreme Court of Spain. The judgments rendered by the Audiencia may be reviewed, but are not appealable. They are reviewable for errors of law, but the facts stated, as proven by the Audiencia, serve as the basis of the judgment rendered by the Supreme Court of Spain. This is touching only summafastigin rerum the procedure as it is in vogue in Spain, which procedure served as supplementary to the procedure in these islands, which, as before stated, is contained in the ninety-five articles of the provisional law and the compilacion.

The word "appeal" is used in Spanish criminal procedure in these islands, in relation to judgments of conviction or acquittal in Courts of First Instance, but the law likewise provides that whether judgment is appealed from or not, in the judgment itself it must be ordered that the case be sent to the Audiencia for review.

The word "appeal" is repeatedly used in the Spanish Code of Criminal Procedure and occurs various times in the Provisional Law, but always in relation to intrelocutory orders. For the first time in the Provisional Law it occurs in Section 47, where it states that the order of the Judge, committing the accused to prison, is appealable. The Provisional Law does not use the word "sentencia" judgment, with reference to criminal cases in Courts of First Instance. It specifies in Article 49 the number of magistrates that are necessary to pronounce "sentencia" judgment as well as sentence in the case, and only indirectly mentions the fact of punishment having been imposed by the lower court.

It was, of course, the practice of the Courts of First Instance in the Philippine Islands to hear all the evidence, both for the prosecution and defense, and pronounce judgment and impose sentence. It is likewise true, however, that that judgment was by no means final. The case was transmitted to the Audiencia, and there the case was heard anew upon the record. Section 51 provides what the judgement of the Audiencia shall state and contain, if the judgment is for convicition. Section 53 of the Provisional Law provides that the judgment of the Audiencia is only reviewable for errors of law. The errors of law for which judgment might be reversed are specified in Sections 61 and 63. In Section 71 the phrase is used "the sentencing tribunal," referring to the Audiencia. This phrase is the usual term used by the Supreme Court of Spain in reviewing criminal cases, and always refers to the Audiencia, whose judgment it reviews.

We have then these facts before us: That in Spain the Audiencias were the sentencing tribunals, frequently with the intervention of juries. In the Philippine Islands the right of a hearing before a jury had not yet been conceded, and the Judges of First Instance in these Islands performed the duties of the judges of Instruction in Spain. The Judge of First Instance, after having heard the evidence in a criminal case, oftentimes with frequent intermediate appeals to the Audiencia upon incidental questions, after the manner of referees and masters in chancery, drew their conclusions of fact and of law in the form of a judgment and sentence, and remitted the whole case to the Audiencia. There the whole case was heard against upon the record, often after the Audiencia had ordered further evidence to be taken. Under no circumstances was the judgment, if it may be so called, of the

Court of First Instance final, except in cases appealed to the Court of First Instance from the Justices' Courts, in cases of misdemeanor.

It will be seen from what has been stated, that it is a very erroneous opinion to think that, under Spanish procedure, either in the Philippines or in Spain, a man stood a chance of being convicted in either one of two tribunals, upon the facts, or that he might be convicted in all the tribunals to which he had access. The judge on Instruction in Spain, as a matter of course sends the case after he has gathered the necessary facts, to the Audiencia, where sentence is pronounced and the facts settled for once and for all. If that court finds certain facts, and renders thereon a judgment of acquittal, the Supreme Court of Spain might enter judgment of conviction, but it could not find the facts otherwise than as found in the Audiencia. In the Phillippine Islands the Court of First Instance heard the evidence, and remitted the whole case to the Audiencia. There the facts were determined and the judgment rendered, without reference to the judgment rendered below, which judgment of the Audiencia could only be reviewed in the Supreme Court of Spain, for errors of law committed.

In Spain, as in the Philippine Islands, the accused was only judged by one tribunal as to his guilt or innocence upon the facts, which was the Audiencia. In the Philippine Islands the Courts of First Instance could neither acquit him nor find him guilty, because the case was not on trial there, and however defective and cumbersome the Spanish procedure may have been, there is not a single provision in it which points to the possibility of a man being compelled to defend himself before two tribunals, each with power to render final judgment, before he was

entitled to his liberty. The opinion of the guilt or innocence of the Court of First Instance was, if anything, but advisory. It required five of the magistrates of the Audiencia to find him guilty of a grave crime, and, as the Audiencia consisted of nine magistrates, and the Court of First Instance of one, the accused was, therefore, not found guilty unless at least one-half of the judges intervening were satisfied of his guilt. This was the state of the law and procedure upon the arrival of the American forces in these islands. The first change in the law was made by order of the Military Government, by the well-known order No. 58, April 23, 1900. This order, although defective in part, is a meritorious document, and embodies many healthful principles of American criminal law, and is a credit to Major Young, its author. After devoting the first fourteen sections to the commencement of a criminal prosecution, it speaks, in Section 15, of the rights of the accused, and states that he shall have a right to appear and defend in person or by counsel, at every stage of the proceedings, and to be confronted at the trial by, and to cross-examine the witnesses against him.

This is the first time that the word "trial" appears in the Philippine Islands, and, as stated before, as it is impossible to translate the word "sumaria" into English for the reason that it is peculiar to Spanish procedure, so also it is impossible to translate the word "trial" into Spanish, for the reason that a trial as known in English and American procedure, is unknown in Spanish procedure. It is, however, usually translated by "vista," which corresponds to our word "hearing" in appellate courts. The Spanish phrase "juicio oral," the hearing before the Audiencia, is similar in meaning. Although the word "trial" is familiar to every American, it will not be out of place to

define it here. Webster states that it is "the formal examination of a matter in issue in a case before a competent tribunal; the mode of determining a question of fact in a court of law; to examine in legal form all facts in issue in a cause pending before a competent tribunal for the purpose of determining such issue." This is the legal meaning of the word in America and England. The definition is short and concise. It will be observed that "trial" means the determination of a question of fact. Of course, in all trials of questions of fact many questions of law will arise, but the principal meaning of the word is the determination of a question of fact. A hearing before an Appellate Court upon questions of law is not a trial.

Thus we see that this sentence,—"to be confronted at the trial by, and cross-examine the witnesses against him," is the guarantee of a right to the accused at the trial of questions of fact as to his innocence or guilt.

The meaning attached to the word "trial" by the legislator, must be the meaning that the word has in the United States, for the word had no meaning in the Philippines at the time it was introduced, and will have no meaning now unless properly interpreted. The word "jury" as used in the constitution of the United States has been interpreted to mean a jury of twelve, because that was the meaning of the word under the common law in England. A trial in a criminal case means an investigation of the fact in issue in a competent tribunal, which, in a criminal case in the United States, is usually a court consisting of a judge and the jury. The defendant has a right to be confronted at the trial, that is before the jury who are charged with his deliverance, in the presence of the judge presiding at the trial.

In the Philippine Islands the word "trial" has not yet been judicially defined by the Supreme Court. It appears to be taken for granted by the prosecution that the right granted to the accused to cross-examine the witnesses at the trial, may be amply enjoyed by the accused before a court which in fact has nothing to do with the determining of guilt or innocence, and having thus been enjoyed the accused may be convicted by a court which has nothing to do with his presence or that of the witnesses. Suppose a man is accused in Zamboanga and brought before a Judge of the Court of First Instance, given a right to cross-examine the witnesses there examined, and is acquitted by the Judge of the Court of First Instance. The case is appealed by the prosecution to the Supreme Court of the Philippine Islands. In Manila, five hundred miles away from where the accused may be in jail, by judges who have never seen him, and whom he has never seen, he is convicted upon evidence given by men whom the judges that convict have never seen, and not one of the witnesses has ever seen the judges that convict. The theory of the prosecution seems to be that that man has been confronted by the witnesses at the trial.

The right to confront his accusers at the trial has been expressly granted to the defendant by the legislator, in Order No. 58, and subsequent provisions of law. It is further provided in the same section as follows:

> "Whereas the testimony of a witness for the prosecution has previously been taken down by question and answer, in the presence of the accused or his counsel, and the defense have had an opportunity to cross-examine the witness, the testimony of the latter may be read, upon satisfactory proof to the Court that he is dead or insane, or can not, with due diligence, be found in the islands."

By this new guarantee the law exacts that where a deposition has been taken, which may be read in the presence of the accused and the trial court, nevertheless, before that can be done it must be shown that the witness is dead or insane, or cannot with due diligence be found in the islands. It is not permitted that the Judge, who tries the case, hear a deposition, taken in the presence of the accused, unless it is satisfactorily shown that the witness can not be had, for the reasons stated in the law. This must be reconciled with the rule permitting all depositions to be read to a tribunal who never sees the accused, and still convicts by enlarging the meaning of the word "trial."

The next provision which has the force of law in these Islands, upon the matter under consideration, is a paragraph contained in the Instructions of President McKinley to William H. Taft and associates on the Commission, dated April 7, 1900, which is as follows:

> "Upon every division and branch of the government of the Philippine Islands, therefore, must be imposed this inviolable rule, that no person shall be deprived of life, liberty, or property, without due process of law; that in all criminal prosecutions the accused shall enjoy the right of speedy and public trial."

The president uses the word "inviolable." It remains for the courts, or perhaps the legislative branch of the government, to keep the meaning of the word "trial" inviolate. The text is quite clear. The difficulty seems to be in the words "Speedy and public trial." Perhaps by that is meant a hearing before a referee with no power to determine the facts in the case.

In interpreting the laws promulgated by the legislative power of the State, it is a rule of interpretation that such

laws were promulgated in view of a necessity that is felt by the legislator. Therefore, the new rights granted by Order No. 58 were given for the purpose that they should be enjoyed, and were granted because the legislator was of the opinion that such law was necessary to guarantee that right to the person whom the law intended to protect, and that such person, prior to such law, did not have such right.

In paragraph 9 of Section 15 of Order No. 58, the accused is granted the right of appeal in all cases. It is evident that the legislator did intend to grant finality to judgments of Courts of First Instance, and allow the accused a right to appeal therefrom. It is true that the practice observed in criminal prosecutions in the Philippine Islands, under the Spanish dominion, permitted an appeal from the judgments of the Courts of First Instance, but it is equally true that such appeal was absolutely of no consequence, except that it gave the defense the right to open and close: for the whole case was sent up to the Audiencia, whether the judgment rendered by the court below was appealed from or not; and the judgment rendered by the Court of First Instance was if anything only advisory. The Audiencia drew its own conclusions of law and of fact and rendered its own judgment, which judgment, under the Spanish procedure, was final, since the accused had only the right of a writ of error to the Supreme Court of Spain.

The judgments of Courts of First Instance now are with one exception final, unless appealed from, and the law only speaks of "trial" in Courts of First Instance in criminal cases. When it grants the accused a "speedy and public trial, and the right to confront his witnesses, did it mean to grant the accused the rights enjoyed by per-

sons accused in the United States, i. e., that the accused should have the right to meet his witnesses face to face before the judge or judges who would have to determine his innocence or guilt?

At this time we come to another right granted the accused by Order No. 58. Section 57 says:

> "The defendant in a criminal action shall be presumed to be innocent until the contrary is proved, and in case of a reasonable doubt that his guilt is satisfactorily shown, he shall be entitled to an acquittal."

This section, of course, means that his guilt must be shown by the evidence adduced at the trial. Section 55 of that Order states that the credibility of a witness may be drawn in question by the manner in which he testified, that is to say, the manner of the witness in testifying is part of the evidence in the case. Section 57, in view of the evidence, and the manner in which it is given at the trial, demands that he must be proven guilty beyond a reasonable doubt. Le us ask: Whose reasonable doubt? The doubt of the trial judge, or the doubt of a tribunal perhaps five hundred miles away? The doubt of the trial judge, who is one, or the doubt of a majority of a tribunal of seven judges? The question as to whether a man must defend himself before two courts, and before one of them in the absence of himself and witnesses, is a question of the gravest character, and requires the most careful consideration of the courts in these islands. The rule that a man should not be put in jeopardy twice, is a bulwark against the encroachment by courts upon the rights of the individual. The law of evidence alluded to, referring to the demeanor of the witness on the stand, can not be expunged from the written law except by legislative action.

By Order No. 58, the right of appeal is granted to the

accused in all cases. When he is acquitted by the lower court and convicted by the Supreme Court upon facts not proven by the lower court, to what court can the accused appeal from conviction? Only to the Supreme Court of the United States, for depriving him of the rights guaranteed by Congress. Is an accused in such case deprived entirely of the right of appeal for ordinary errors, however great? Suppose A. is convicted of estafa for having swindled B. upon a state of facts which could not be proven in a civil suit between the parties, by reason of estopple?

This right of appeal granted by Order No. 58 might be construed in the light of the new circumstances existing at the time of the promulgation of that Order, and as giving a different effect to a judgment of a Court of First Instance, even at that time. The right of appeal on matters of law, from the judgments of the Audiencias, had been taken away by the advent of American sovereignty. A fair interpretation of Order No. 58 gives that right of appeal to the accused from judgments of Courts of First Instance.

The rights guaranteed by Order No. 58, and by the instructions of President McKinley, have likewise been guaranteed by Act of Congress. It would be interesting to rehearse the history of the conditions under which we were born the right of a speedy trial and to be confronted by the witnesses at the trial, but it would be too long, and it is entirely unnecessary to do so. It would sound somewhat new to hear that a man, confronting his witnesses before a referee in Northumberland, might be convicted before a court in London upon the evidence so taken, even though the court were assisted by a jury of twelve, and be solemnly declared to have enjoyed the rights of a speedy and public trial.

Section No. 42 of Order No. 58, provides:

> "At any time before the final entry of a judgment for conviction the defendant may move, either in the court in which the trial was had or on appeal to a higher court, for a reopening of the case on the ground of newly discovered evidence material to his defense."

It is plain here that the legislator had in mind the great difference between the finding of guilt as charged and the rendition of a judgment upon such finding. It is true that the meaning is obscured thereafter in the same section, doubtless due to haste in drawing Order No. 58. In this section is mentioned the only error of fact which is the one that may be shown by newly discovered evidence. This gives the court power to set aside its findings if error of fact has been committed prejudicial to the accused. Now, if it was intended to give the prosecution a right to review a determination of fact, why not by motion based on newly discovered evidence, which might show the error conclusively beyond a reasonable doubt?

Applying to this provision of law, relating to the one error of fact, the rules of statutory interpretation, we might conclude that the legislator meant that questions of fact should not be reviewable in any other manner, not even when such error of fact was committed to the prejudice of the accused; and that the legislator meant that the finding, unless attacked in the manner provided, should be as conclusive as a verdict of a jury.

In criminal practice in the United States there is the verdict, the judgment, and the sentence, although the sentence may be usually found in the judgment. Now it is a plain fact that an accused may be sentenced one, two, or three times, under the same judgment, as delays occasioned by appeals, reprieve, etc., may require; but one

judgment, however, can be rendered upon a verdict or finding of guilty. The right of appeal from the judgment does not imply the right to review the facts upon which the judgment is based. There may be a judgment of acquittal non obstante verdicto of guilty. The trial judge may find that, although the defendant was found guilty by the jury as charged, the facts charged do not constitute an offense. Here there may be a finding of fact that shows guilt, but which the judge erroneously deems not constitutive of a crime, or as not punishable because of prior conviction, etc., and in this a reversable error in a judgment of acquittal may consist.

In a civil case uncontradicted evidence may give rise to a question of law. That, however, is not the case in a criminal proceeding. In a criminal prosecution, the reviewing court can never say that the evidence is uncontradicted where the defendant has entered a plea of not guilty, for the presumption of innocense is evidence itself; and the courts in the United States hold that a judge can never instruct a jury to bring in a verdict of guilty, however conclusive and uncontradicted the evidence may be.

Section 42 also states:

> "Within a like period after conviction (and no period is specified), a case may be reopened on account of errors of law committed at the trial, and in the last sentence, 'the new hearing, if allowed, shall take place in the court of original jurisdiction.'"

All these matters set forth have a tendency to show that by Order No. 58 the Court of First Instance is made the trial court, and that it must determine the facts in the case and render judgment, which judgment is appealable. In this connection it becomes necessary to define the meaning of the word "appeal."

In the early history of the United States, and in the

jurisdiction of England, the word "appeal" is only used in equity suits. The word "appeal" then means the right to have the whole case tried before an appellate tribunal, the facts as well as the questions of law. This is likewise the Spanish meaning when applied to Spanish judgments. That meaning still continues in many States of the United States, but the meaning is not now universal. It is often applied to statutory methods of reviewing a judgment of a lower court, when in fact only questions of law can be examined. When all the provisions of Order No. 58 are construed together, in the light of American jurisprudence, the latter meaning might be attached to the word "appeal," *i. e.*, that on an appeal all the questions of law may be reviewed by the appellate tribunal. On the part of the defendant that would include the question as to whether there existed in the record, evidence sufficient to warrant a conviction under any circumstances, because the sufficiency of the evidence to sustain the judgment is a question of law. The difference between the right of the prosecution and the right of a defendant on an appeal would then be that the appellate tribunal might hold that the defendant was entitled to his acquittal, although he had been convicted below, because there was not legal evidence sufficient in law to sustain a judgment of conviction; while the prosecution could not make the same contention, *i. e.*, that although the defendant had been acquitted below, he could be convicted above.

Sections 43 and 44 of Order 58 are not susceptible of a clear interpretation. These sections, like several others of that order, are defective and imperfect, doubtless resulting from the fact that Major Young could not have been familiar, at that time, with the criminal law and procedure in force in these islands.

The first sentance of Section 42 is as follows:

> " From all final judgments of the Courts of First Instance, or Courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the Supreme Court, as hereinafter prescribed."

This sentence has no meaning. When this law was enacted, there was no judgment of a Court of First Instance that was final, because necessarily they were all reviewed by the Audiencia. Again, the words "in which the law now provides for an appeal," have no meaning when construed in the light of the spirit of the whole order No. 58, because literally interpreted this latter clause would allow innumerable appeals during the trial of every case. Under the Spanish procedure, to which this clause refers, an appeal to the Audiencia is allowed on many questions relating to the admissibility or non-admissibility of evidence, and on many other orders. For instance, if literally interpreted, it would allow an appeal to the Supreme Court from a warrant of arrest, because, under the Spanish procedure, the order of a Court committing a person to prison is appealable, and would thus lead to a greater confusion than was attempted to be remedied.

Section 44 is as follows:

> " Either party may appeal from a final judgment, or from an order made after judgment affecting the substantial rights of the appellant, or in any case now permitted by law."

A fair interpretation of this sentence of Section 44 means that it permitted the private prosecutor of the defendant an appeal from the judgment rendered. It must be remembered that in many of the criminal prosecutions, under the old procedure, there was a private prosecutor,

and there might be in all, so that there were usually, or often, three parties, *i. e.*, the fiscal, the private prosecutor, and the accused, as in the present case.

Now, by Section 107, the rights of the private prosecutor are preserved. It may be well to state here that in criminal prosecutions, under the old procedure, a judgment for damages might be rendered, and in fact was necessarily rendered, in favor of the party aggrieved, or his representative, and the civil and criminal questions were determined in one proceeding; so that what in the United States is often a separate prosecution for damages, is, under Spanish procedure, simply a part of the criminal prosecution. It is impossible to solve logically the difficulties that arise in this connection, for the private prosecutor's rights should be sustained on a preponderance of the evidence, while guilt of crime can never be safely fixed without clear evidence.

When Section 44 speaks of "substantial rights of the appellant," it refers to the party aggrieved, the private prosecutor, and not the prosecution. The phrase "substantial rights" has a very clear and concise meaning in the jurisprudence of the United States. The phrase is used in civil suits, and certainly is not found in criminal procedure with reference to the rights of the State in a prosecution for crime. The rights of the state are not affected when an accused is acquitted on a public trial; they are vindicated. It is not only the right of the individual, but as well that of the State, that its citizens shall not be twice put in jeopardy by the spleen or interest of private, or over-zealousness of public prosecution. The State has promulgated this rule in written law, and it is therefore its right, as well as the right of the accused. The State demands the application of the law; so that it is purely a question of interpretation.

This brings us to the consideration of the meaning of the words "jeopardy of life or limb" and "jeopardy of punishment." The phrases are not susceptible of definition separate and apart from the word "trial." Difficulties arise at times in determining at what stage of the trial jeopardy attaches, when without fault of the accused the trial is not concluded. When an accused has been legally tried and acquitted, he has been in jeopardy. To have been in jeopardy never requires more than one legal trial. It is satisfied at times with part of a legal trial without acquittal. Acquittal here means the finding of "not guilty," and not necessarily the judgment or application of the law to the facts found.

If an appeal means a trial *de novo* before the higher court, then there is room for the contention that there were two trials before different courts under different methods of procedure. The situation has its difficulties. When a man is put on trial before a judge who may acquit or convict, and he is acquitted upon the facts of the case, can the prosecution, private or public, say, that under the right to review that judgment, it will put him on trial before a tribunal consisting of seven judges, where four of the seven may convict, and insist that it is one jeopardy? If it is but one jeopardy, what prevents a man being subjected to trial by a line of five courts, each with power to convict and acquit. If trial upon the facts before two tribunals is but one jeopardy, there is no reason why a trial before five tribunals, variously constituted, should be more than one jeopardy. From this it seems that the word "trial" must be interpreted to mean, and include, successive steps in the same case before several tribunals, each with power to convict, in order to avoid the scylla of jeopardy.

With the enactment of law 136, organizing the courts of the Philippine Islands, a much different question arises. The present Supreme Court of the Philippine Islands is entirely different in its jurisdiction from the Audiencia under the Spanish rule. The Courts of First Instance have an entirely different jurisdiction. Let us see what that is. Section 16 of that act says:

> "The jurisdiction of the Supreme Court shall be of two kinds, original and appellate."

Section 17 says:

> "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto, in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law."

Section 18 says:

> "The Supreme Court shall have appellate jurisdiction in all actions and special proceedings properly brought before it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court."

The Courts of First Instance also have two jurisdictions—original and appellate. Section 56 has seven paragraphs. Section 6 grants to Courts of First Instance original jurisdiction in all criminal cases in which a penalty of more than six months' imprisonment, or a fine exceeding one hundred dollars, may be imposed.

When a territory organized under laws of Congress is admitted into the Union as a State, it always happens that many of the cases pending in the Territorial courts have to be transferred to the Federal courts for the newly or-

ganized state, and many cases to the state courts of the new state. On the admission into the Union of a state, provision is always made for cases pending in the Territorial court, the same as the provision made by the Commission for the cases pending both in the extinguished courts of First Instance and the Audiencia. Cases not thus provided for in the extinguished courts would remain suspended in mid air. Appeals pending must likewise be provided for, as it is a well-known principle of law that an appeal from a judgment rendered is no vested right, and that the dissolution of the appellate court makes the judgment appealed from final and conclusive, inasmuch as the right of appeal is not an absolute right and is not necessary to the due process of law. The Audiencia, the old appellate tribunal, having been dissolved, and no procedure having ever been provided for appeal to the new Supreme Court upon the strict principle of the law, the defendant would not even have the right to appeal, for the reason that, as stated before, the right of appeal is no absolute right, and it is not necessary to the due process of law.

Reverting to the question of fact in this case, I am of opinion that the game in question was not a prohibited game, since the law at that time only prohibited the playing of it in a gambling house. It was an offense to keep, as well as to play, in a gambling house, but not to play in other places. An act does not become illegal in itself by being made illegal when performed in particular places. Of this, various instances might be cited, both of places and acts.

The object of the promise to pay executed by Ramon Gomez Ricoy in favor of Lucio Angeles, was the payment of a gambling debt, and this object was neither unlawful

nor illegal, much less immoral. Had the said Ricoy paid it, he could not have recovered. The gambling may have been immoral, and was certainly a bad custom; but when a person has lost at game, having had a chance to win, it is certainly more dishonorable to repudiate his obligation than to pay it. For the same reasons the consideration for the promise was neither illegal, unlawful, nor immoral, the consideration being the gambling debt which it was perfectly lawful to pay. In fact, the man who plays with the intention of not paying if he loses, does not even gamble, but attempts to swindle, trusting that he will have more luck and less honor than his competitor.

Article 1800, in my opinion, is not a limitation on the provisions of the penal law, but on the effect of article 1789. Neither in my opinion, is the question under consideration affected by the fact that the money and gambling implements were subject to confiscation. A man may be robbed of a weapon that he unlawfully carries concealed. Forfeiture and confiscation are questions between the owner and the state, by which third parties neither lose nor gain.

Article 1798, however, is decisive of the question in this case. The money won in a game cannot be recovered at law. This is just what the private prosecutor seeks to do. It matters little whether Lucio Angeles won directly from the said Ricoy or not. With the exception of the small amounts lost by others, which is balanced by the amount paid by the said Ricoy, the latter lost what the former won. Under statutes similar in nature, permitting the recovery of money lost at gaming where A. and B. and C. play, and A. wins from B., and B. wins from C., C can recover from A. Lucio Angeles won the money and Ramon Gomez Ricoy lost, and all the parties that in-

tervene in the transaction from the losing and winning until the execution of the promise to pay by the said Ricoy to the said Angeles, were parties to the gambling, and the due bill therefor is just as invalid as though it had been executed between them for the amount directly lost by one to the other. The due bill, being of no value whatever, could not be the subject of the crime charged.

The finding of guilty in this case would mean the issuance of execution for the recovery of the amount of the gambling debt, and the selling under legal process of perhaps the house and home of the accused. The law forbids this. A good example why that should be so is found in this very case, where there is testimony of a certain other player transferring his last house, and with tears begging that his check be taken up and returned, in consideration of such transfer, to avoid being likewise prosecuted for estafa.

For the reasons stated, I am of opinion that however dishonorable and contemptible the act of the said Ricoy may be, even among gamblers, he is not guilty of the offense charged, and being of that opinion, it will not be necessary for me to decide the other serious questions of law alluded to in the first part of this decision.

Dated, August 20th, 1903.

WM. J. ROHDE.

I hereby certify that the foregoing is a true and complito (complete) of its original.

Manila, 24 August, 1903.

J. MCMURRY,

Clerk of the Court of First Instance of Manila, Ex-Officio Notary Public.

[SEAL.]

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THOMAS E. KEPNER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 244.

SECUNDINO MENDEZONA Y MENDEZONA,
plaintiff in error,
v.
THE UNITED STATES. } No. 584.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THOMAS E. KEPNER, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 244.

SECUNDINO MENDEZONA Y MENDEZONA, plaintiff in error, v. THE UNITED STATES. } No. 584.[a]

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Thomas E. Kepner, plaintiff in error, a member of the Manila bar, was tried by the court of first instance of the city of Manila in November, 1901, on the charge of *estafa* (embezzlement of the funds of a client) and acquitted.

[a] An examination of the record in this case (pp. 29 and 30) will disclose that the only issue raised therein is the so-called "jeopardy question." In view of this fact, and the further fact that this issue is discussed at length herein, under the Third Assignment of Error, it is deemed unnecessary to make a statement of the facts and file a separate argument in said case No. 584.

Under the law now in force in the Philippine Islands, which gives the government as well as the accused the right of appeal from final judgments of the courts of first instance in criminal cases, the government appealed the case and the supreme court reversed the judgment of the lower court, sentencing plaintiff in error to one year eight months and twenty-one days' imprisonment, together with suspension from the office of attorney at law.

The case is here on writ of error. The assignments of error are as follows:

> First. That the court erred in entertaining an appeal by the United States from the judgment of acquittal rendered by the trial court, because the defendant and respondent was never legally tried in said trial court by a jury as provided by Article III, section 2, amendment 6, of the Constitution of the United States.
>
> Second. That the court erred in overruling the motion of defendant and respondent to dismiss the appeal, because such appeal is prohibited by the Constitution of the United States, amendment 5, which provides that no person shall "be subject, for the same offense, to be twice put in jeopardy."
>
> Third. That the court erred in overruling the motion of defendant and respondent to dismiss said appeal, because said appeal was prohibited by the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of

civil government in the Philippine Islands, and for other purposes," which provides that "no person for the same offense shall be twice put in jeopardy of punishment"

First and Second Assignments of Error.

The first and second assignments of error are based upon the proposition that the Constitution of the United States, in its entirety, has been in full force and effect in the Philippine Islands since the date of the ratification of the treaty of Paris, and hence the provisions guaranteeing the right of trial by jury and the provision prohibiting double jeopardy (as the term is understood at common law) have existed in the islands since that date.

This court has recently held in the so-called Insular Cases that exactly the contrary of the foregoing proposition is the law. It held in those cases that the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the territories rests in Congress; that notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to fundamental rights which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial

trials, which do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations for the Territories of the United States.

This position is identical with that taken by Chief Justice Marshall in the case of *American Insurance Co.* v. *Canter* (26 U. S. Rep., 542), and by Mr. Webster, who argued the case before him. In that case it will be observed that the "Great Chief Justice," without devoting any time to the discussion of the question of the source of the power, announced with great clearness and force that the existence of such authority in Congress could not be questioned.[a]

In view of the foregoing decisions, the only practical question left for determination in cases

[a] In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory, or other property, belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.

* * * * *

These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. (26 U. S. Rep., 542, 543, 546.)

like the one at bar is: What are those constitutional guarantees which Congress may, in its discretion, extend to or withhold from territory which has not been incorporated into the United States? Fortunately for the determination of this case, the court has answered this question, in the recent case of *Hawaii* v. *Mankichi*, as follows:

> We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case[a] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

The power of Congress to provide such modes of trial and methods of procedure as, in its judgment, are best adapted to the needs of the people of the territory, is here clearly recognized. Such power was also recognized in the case of Ross, petitioner, 140 U. S., 453.

In the light of these decisions, it must be deemed that the propositions contained in the first and second assignments of error have been finally ad-

[a] Common law trial by jury and indictment by grand jury.

judicated, and we shall not consume the time of the court with further discussion of them.

Third Assignment of Error.

The sole question raised in this case, in our opinion, is whether the provision of the Code of Criminal Procedure now in force in the Philippine Islands, which gives the government, as well as the accused, the right of appeal from judgments of the trial court in criminal cases, is repealed by the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," which provides that no person "for the same offense shall be twice put in jeopardy of punishment."

General Order No. 58, of the United States military government in the Philippine Islands, issued April 23, 1900, has never been repealed and is at the present time the criminal code of procedure of the islands. Sections 43 and 44 of said general order are as follows:

> SEC. 43. From all final judgments of the courts of first instance of similar jurisdiction and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court as hereinafter prescribed. Appeals shall also lie from final judgments of justices of the peace in criminal cases to the courts of the next superior grade, and the decisions

of the latter thereon shall be final and conclusive, except in cases involving the validity or constitutionality of a statute, wherein appeal may be made to the supreme court.

SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant, or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint and from an order dismissing a complaint or information.

By this general order the right of appeal in criminal cases, given to the government by the Spanish criminal law, was expressly continued. It is impossible to doubt that, in accordance with the law before cited, the government possessed the right of appeal from all verdicts of acquittal in criminal cases up to the enactment of the act of Congress of July 1, 1902, providing for civil government in the Philippine Islands. This statement can be controverted only on the supposition that the right of appeal in question constitutes double jeopardy and that the constitutional prohibition against double jeopardy was, *proprio vigore*, in force in the Philippine Islands from the date of the exchange of ratifications of the treaty of Paris, which would be in exact opposition to the decision of the Supreme Court of the United States in the recent cases just referred to.

This being so, it must follow that if such right of appeal by the Government in criminal cases does not now exist in the islands, it is solely because of the provisions contained in the act of Congress of July 1, 1902. Said act contains two provisions relating to criminal procedure in the islands, which must be considered together in determining the effect of said act upon the Government's right of appeal in criminal cases. These two provisions are as follows:

> SEC. 5, par. 3. That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment nor shall be compelled in any criminal case to be a witness against himself.
>
> SEC. 9, first sentence. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure.

The contention of the plaintiff in error is that the provision first cited takes from the government all right of appeal from judgments of acquittal in criminal cases, on the theory that the effect of such appeals is to put the party accused twice in jeopardy for the same offense.

The contention of the defendant in error, on the other hand, is that it can not fairly be supposed that Congress, by the insertion of a general clause, intended to sweep away the entire existing system of criminal procedure in the islands, but as section 9 of said act contained simply a repetition of the law giving the supreme court jurisdiction to hear appeals on behalf of the government from judgments of acquittal in criminal cases, so it must be held that Congress, by the clause in question (sec. 5, par. 3), intended to simply reaffirm the principle of jeopardy which exists both in the Roman law and in the common-law systems of jurisprudence, and give it an application in harmony with the system of procedure in force in the islands at the date of the passage of the act.

We desire, at the outset, to call the attention of the court especially to the fact that the principle that a person shall not be twice put in jeopardy for the same offense is as firmly embedded in the Spanish law as it is in the law in the United States. The difference in the two rules, which is one of application merely, arises from the difference between the common law and the civil law conceptions of what constitutes a trial. Broadly speaking, under the American law jeopardy ends with the conclusion of a trial by a jury. Under the Spanish system jeopardy ends when the case has been heard by the supreme court on appeal and the latter has rendered a final judgment. Under the Spanish system there is no jury trial and the

judgment of the trial court is but little more than advisory. It may be modified, set aside, or reversed on appeal. It is not an uncommon occurrence for the supreme court to increase the punishment of persons who have been convicted by the lower court, and it often convicts persons who have been acquitted by the trial court. But when this is done the jeopardy ends. There is no reviewing the case after the supreme court has passed upon it. Until recently cases went to the supreme court as a matter of law, no appeal being necessary. But this has been modified to the extent of making the judgments of the courts of first instance final, unless an appeal is taken by the attorney-general or the accused within twenty days. It is thus seen that, under the law, there is no real finality of judgment until both tribunals have passed upon the case. *The review of the case by the supreme court is a part of one continuous trial.*

It must also be borne in mind that section 9 of the before-mentioned act provides for the retention by the supreme court and courts of first instance in the Philippine Islands of their existing jurisdiction. This provision is clearly intended to include criminal as well as civil, appellate as well as original. The expression "jurisdiction as heretofore provided" must refer to the laws on this subject existing before the passage of this act, as there is no prior provision in the act itself relative to such jurisdiction.

The facts just recited, namely, that the law against double jeopardy existed in the Philippine Islands before the passage of the act of Congress and that section 9 of said act expressly states that the courts in the Philippines "shall possess and exercise jurisdiction as heretofore provided," are significant when considered in connection with the rules of interpretation which must govern in this case.

For the purpose of avoiding confusion in the application of the rules of interpretation, let us, for the moment, eliminate from our consideration the fact that the law of criminal procedure in the Philippines now under discussion emanated from the Spanish Government and the military branch of the Government of the United States, and suppose, for the sake of the argument, that said law is there by virtue of an act of Congress.

Let us suppose that on July 1, 1901, Congress legislated for the Philippine Islands and included in the act the following provisions:

> 1. That no person shall be twice put in jeopardy of punishment for the same offense; but jeopardy shall not be deemed to have ended until the supreme court has reviewed the case on appeal and rendered final judgment thereon: *Provided, however*, If the attorney-general fails to perfect an appeal from the judgment of the trial court in accordance with the provisions of the law, jeopardy shall be deemed to have ended

upon the rendition of final judgment by the trial court.

2. The Government shall have the right, in all criminal cases, to appeal from all judgments of acquittal by the court of first instance, and the supreme court of the Philippine Islands shall have jurisdiction to hear and determine such appeals.

This is a fair statement of the law as it existed in the Philippine Islands at the time of the passage of the Philippine government act on July 1, 1902.

Now, let us place alongside the foregoing the following provisions of the act of July 1, 1902.

1. No person, for the same offense, shall be twice put in jeopardy of punishment.

2. The supreme court of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands.

This narrows the issue to one simply of statutory construction: Did Congress, by the second act, mean to repeal the first? Was it the intention of Congress to sweep away, by the use of a single general clause, the entire system of procedure then existing in the islands without substituting another in its place? The first act provides for a separate, distinct, and complete method of trial in criminal cases. It provides for trial by judges instead of trial by juries and contains an application of the rule against double jeopardy consistent

with such a systen of procedure. The second act, after providing in general terms against double jeopardy without any explanation of the intended application of the rule, provides in special terms that an important portion of the original law of procedure shall be continued in force, viz, that the supreme court shall have jurisdiction to hear and determine appeals in criminal cases from the courts of first instance, both on behalf of the government and on behalf of the accused.

Since the act does not in terms provide for a change in the application of the principle of jeopardy, can it be said that it does so by implication? We do not think this proposition can be maintained. It is hardly fair to suppose that Congress intended to abolish an entire system of procedure without evidencing such an intention by the use of a repealing clause or by substituting another system in its place. If it had intended to modifiy the application of the principle of jeopardy as it now exists in the Philippine Islands, and take from the government the right of appeal in criminal cases, it could have accomplished that purpose by appending to the clause that "no person shall be twice put in jeopardy of punishment for the same offense" the words "and the law giving the government the right of appeal from judgments of acquittal by the courts of first instance in criminal cases is hereby repealed." Far from doing this Congress reaffirmed the law, which gave the supreme court the same jurisdiction to hear appeals

from the trial court which it formerly had, and simply provided against double jeopardy.

It will be observed that the two statutes deal with the same subject-matter. That all statutes *in pari materia* are to be considered together goes without saying. It is also needless to call the attention of the court to the familiar and fundamental principle of law that *the legislature is always presumed to have had former statutes before it, to have been acquainted with their judicial construction, and to have passed new statutes on the same subjects with reference thereto.* (*State* v. *Gerhardt*, 33 L. R. A., 313, 322; *Earl of Ailesbury* v. *Patterson*, 1 Doug., 28; *State* v. *Lineberger*, 72 Pa., 241.)

Congress was here dealing with a new and unique subject-matter. It knew that the Philippine Islands were, at the time of the passage of the act, governed under a system of laws separate and distinct from our own; it knew that the principles of the civil law prevailed in all Spanish countries, and that under that system of jurisprudence the right of trial by jury did not exist; it knew that the Spanish law on the subject of jury trial and jeopardy had been reenacted by the military commander in the Philippines. The law on the subject is plain and simple. Congress also knew, or is presumed to have known, that the supreme court in the Philippine Islands had uniformly held,[a] in interpreting the laws in question, that

[a] *D. Juan Garvia* v. *D. Cesar Lopez Garcon*, criminal branch, supreme court of justice, Philippine Islands, September 12, 1900; *United States* v. *D. Mateo Perez*, supreme court, Philippine Islands, April 9, 1902.

jeopardy does not end, in the islands, until the case has been reviewed by the supreme court and final judgment rendered thereon.

That Congress took into consideration the peculiar circumstances surrounding the subject-matter and the particular system of laws in force in the islands is not a mere matter of presumption, but is evidenced by the fact that when it touched upon the subject of criminal procedure it omitted the chief feature of that branch of the law as it exists in common-law countries, viz, the system of trial by jury, thus demonstrating that it meant to conform, as far as possible, to the system of jurisprudence then in force in the islands. The conception of double jeopardy, as it exists in England and the United States, is indissolubly connected with the system of jury trial, and we submit that it is not reasonable to contend that Congress in changing this fundamental rule of procedure did not also mean to change the application of the auxiliary principle of jeopardy. If Congress had extended the system of trial by jury to the Philippines, then the position of plaintiff in error herein would be unassailable, but when he contends that Congress meant to engraft upon a Roman law system of trial by judges the application of a common-law rule against double jeopardy, incident only to the system of trial by jury, and this, too, by the use of a general expression, his position lacks the support of sound reason, as well as of the rules of

statutory construction, and we think is too extravagant to be maintained.

It will be found that all the rules of construction and interpretation support the Government's position herein.

Rules for Construction and Interpretation of Statutes.

The following five generally applied rules for the construction and interpretation of statutes are submitted as furnishing the proper principles to be applied in the construction and interpretation of the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," and in determining the effect of said statute upon the right of the Government to appeal from judgments of acquittal in criminal cases.

1. Every statute should be so interpreted and construed as to ascertain and carry into effect the meaning and intent of the legislative body by which said statute has been enacted.

2. If possible, a statute should be so interpreted and construed as to give effect to every provision therein.

3. There is a strong presumption against the repeal by a statute, by implication, of any existing law; there is a presumption against unnecessary change of laws.

4. If two provisions in a statute are inconsistent, the more particular provision will prevail over the more general one.

5. Where two or more provisions contained in the same statute are directly in conflict with one another and can not be brought into harmony by any rule of construction, one or the other of the two following principles must be applied:

(*a*) The provision latest in position will prevail, or

(*b*) The contradictory provisions cancel each other and both are void.

Rule 1.

Every statute should be so interpreted and construed as to ascertain and carry into effect the meaning and intention of the legislative body by which it was enacted.

The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced. If a statute is valid, it is to have effect as the meaning and intent of the lawmaker; the intent is the vital part, the essence of the law. (Black on Interpretation of Laws, section 24; Sutherland on Statutory Construction, section 234.)

This court, in the case of *Hawaii* v. *Mankichi*, discussed at length the canons of statutory interpretation, and its holding in that case, although on a different set of facts, is significant in determin-

ing the question involved in this controversy. The court there said:

> But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislature? Without going back to the famous drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intent of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske* (23 Wall., 374, 380), "A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

The case of *Hawaii* v. *Mankichi* grew out of the joint resolution adopted by Congress July 7, 1898. (30 Stats. L., 78.) This resolution was, in part, as follows:

> The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

The law of Hawaii at that time allowed an accused party to be put on trial upon an indictment not found by a grand jury and to be convicted by

the verdict of nine out of twelve jurors. It was claimed that this was in conflict with the sections of the Constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, and that in all criminal prosecutions the accused shall enjoy the right of speedy and impartial trial by a jury of citizens of the State where the crime shall be committed (fifth and sixth amendments to the Constitution), which jury has been held by the Supreme Court of the United States to be the old common-law jury of twelve men. (*Thompson* v. *Utah*, 170 U. S, 349; *Maxwell* v. *Daw*, 176 U. S., 586.)

In *Hawaii* v. *Mankichi*, however, the majority of this court held that this apparently express prohibition against indictments not found by grand jury and against verdicts of juries by less than a unanimous vote, contained in the Newlands resolution, must yield to the intention of Congress, contrary to their literal words. The reason which led the court to this conclusion as to the intent of Congress was that *it could not be supposed that Congress, by a general expression contained in one of its acts, intended to abolish the existing system of procedure in Hawaii, especially where the act contained no provision for the establishment of any new system of procedure.*

RULE 2.

If possible, a statute should be so interpreted and construed as to give effect to every provision therein.

The foregoing rule also supports the contention of the Government herein. If practicable, effect must be given to all the language employed. Statutes should be so construed, if possible, as to give effect to all their clauses and provisions. (Sutherland on Statutory Construction, section 239; Black on Interpretation of Laws, section 232.)

It was an ancient maxim of the law that "interpretare et concordare legis est optimus interpretande modus," that is, to interpret, and to do it in such a way as to harmonize laws with laws, is the best method of interpretation. (Stouter's case, 8 Coke, 169; 22 L. R. A., 67.)

It is an elementary principle of construction that effect must be given, if practicable, to every word, clause, and sentence of a statute. (*C., C., C. & St. L. R. Co.* v. *Backus*, 18 L. R. A., 729.)

In construing statutes it is well settled by the rules of construction that the prime object is to ascertain and carry out the purpose of the legislature, and in construing statutes the courts *will look to all parts of the same statute*, to other statutes, and to the general principles of law, and assign such meanings to the words of the statute construed as will make them all effective. (*Storms* v. *Stevens*, 104 Indiana, 46; *Hunt* v. *Lake Shore & Mich. South. Ry.*, 112 Indiana, 69.)

If section 9 of the act of Congress of July 1, 1902, is given the meaning which it would have if taken in the sense which its words possess ordinarily and in the sense which the Government maintains it should have, due force can still be given to the provision against double jeopardy. Moreover, if the provision against double jeopardy is held to prohibit the right of appeal by the Government in criminal cases, then part of section 9 must be absolutely disregarded. These two sections can only be harmonized by the construction suggested by the Government and supported by the foregoing rule.

RULE 3.

There is a strong presumption against the repeal by a statute, by implication, of an existing law; there is a presumption against unnecessary change of laws.

Speaking of such presumptions, Maxwell, in his work on Interpretation, second edition, 96, says:

> One of these presumptions is that the legislature does not intend to make any change in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe

> rights, or depart from a general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they are not really used.

Black, in his Interpretation of Laws, section 52, says:

> It is presumed that the legislature does not intend to make unnecessary changes in the preexisting body of law. The construction of a statute will, therefore, be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question.

Sutherland on Statutory Construction, section 217, also says:

> The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.

The court, in *Robinson's case* (131 Mass., 376), said:

> The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part and in the light of the common law and of previous statutes upon the same subject. And the

legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors, or to introduce a fundamental change in long-established principles of Law.

Manuel v. *Manuel*, 13 Ohio St., 458.
Bear's Adm'r. v. *Bear*, 33 Pa. St., 525.
Thompson v. *Mylne*, 4 La. Ann., 206.
Childs v. *Johnson*, 6 La. Ann., 634.
L. R. A., Vol. 4., p. 309, note.

The following propositions have also been well settled by a long line of decisions:

A construction allowing both acts to stand will be adopted and a later will supersede an earlier law only to the extent that they are irreconcilable.

A repeal by implication is not favored.

The general policy of the law is adverse to repeals by implication.

A statute can only be repealed either by express provision or by necessary implication, and to justify a repeal by implication there should be such a repugnancy in the new law as to lead to the conclusion that the later law abrogated, or was intended to abrogate, the former.

Where no repealing words are inserted in a later act, a strong presumption arises that no repeal was intended.

Hunt v. *Chicago Horse & Dummy Ry. Co.*, 121 Ill., 638.
Plum v. *Lugar*, 8 Cent. Rep., 591.
State v. *Cooper*, 13 Western Rep., 347.
Pac. Ry. Co. v. *Cass*, 53 Mo., 17.

Mc Vey v. *Mc Vey*, 51 Mo., 406.
49 N. J. Law, 557.
114 Indiana, 12.

While a later statute might repeal a former one without express language to that effect, yet it can not be supposed that the legislature in framing a general statute intended to repeal a special statute made necessary by local circumstances.

The legislature is presumed to have legislated with a view to former statutes, to have been acquainted with their judicial construction, and to have enacted new laws with reference thereto.

The policy of the United States has always been against abrupt and sweeping changes in the private law found existing in newly acquired territory. This is shown by its action at the time of the acquisition of Louisiana, of California, and of Hawaii, and it has been its well-settled policy in the Philippine Islands, as evidenced by the general instructions of the President to the United States Philippine Commission, and by its declared intention contained in the act of Congress of July 1, 1902, to continue the prior existing private laws except as abolished or modified by express legislation.

RULE 4.

If two provisions of a statute are inconsistent, the more particular provision will prevail over the more general one. (*Black on Interpretation of Laws, 140.*)

> When a legislative act contains two sets of provisions, one giving specific and precise directions to do a particular thing and the other in general terms prohibiting certain acts which would, in the general sense of the words used, include the particular act before authorized, the general clause does not control or affect the specific enactment.
>
> Sutherland on Statutory Construction, section 158.
>
> *State* v. *Inhabitants of city of Trenton*, 38 N. J. Law, 64.

These interpretations harmonize with the rule that when a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one.

> It thus appears that words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect. (*Neb. ex rel. Douglas County* v. *Cornell*, 39 L. R. A., 513, 516, 517.)

The various general provisions contained in the Bill of Rights of the Federal Constitution and in the act of July 1, 1902, are broad generalities, the precise limits of which are hard to determine, and which to-day in the United States do not, in all cases, retain the meaning they originally possessed in England; nor have these different provisions

always received the same construction in the different States of the Union. For example, the interpretations given to the declaration against double jeopardy in the States of Connecticut and Illinois are diametrically opposed to each other in certain respects.

Such general legal abstractions can never prevail against direct expressions of legislative will contained in instruments of equal legal force. An express provision in a statute is, of course, unconstitutional where opposed to one of these general prohibitions contained in the Bill of Rights forming part of the Constitution, but this is not the case where the general and specific prohibitions are both contained in the same statute. The rights of personal safety and liberty, guaranteed by the Constitution in general terms and maxims, are for the purpose of maintaining certain substantial rights and not particular forms and methods of procedure. This very question of the relative effect to be given to two provisions of a statute or code, one putting in force new legal principles in general, and the other specifically continuing certain existing legal principles, came before this court in the case of *Hawaii* v. *Mankichi*, and the court characterized the suggestion that the former could prevail over the latter as "*rather fanciful than real.*"

RULE 5.

Where two or more provisions contained in the same statute are directly in conflict with one another and can not be brought into harmony by any rule of construction, one or the other of the two following principles must be applied in the construction of said statute:

(a) *The provision latest in position will prevail; or*

(b) *The contradictory provisions cancel each other and both are void.*

Sutherland on Statutory Construction, section 220.

The proposition that the provision which is latest in position repeals the other has been laid down in a number of cases.

Packer v. *Sunbury R. R. Co.*, 19 Pa. St., 211.

Harrington v. *Rochester*, 10 Wend., 547, 553.

Gibbons v. *Brittenum*, 56 Miss., 232.

Ryan v. *State*, 5 Nebr., 276, 282.

Being later in position, the later provision is deemed the prevailing expression of the legislative will.

This principle is embodied in the Code of California, section 1022 of which is as follows:

> If conflicting provisions are found in different sections of the same chapter or article, the last section prevails unless such construction would be inconsistent.

This rule is to be applied only as a last resort, and is not in every instance of great value. In the present case, however, its effect is to destroy the position of the plaintiff in error. His contention can only be sustained by holding that not only the right to appeal by the Government in criminal cases is contrary to the provision against double jeopardy, but also by holding that section 9 must be rejected in part because contrary to the provision against double jeopardy in section 5. It is not believed by the Government that if a correct interpretation is given to the provision against double jeopardy there is any conflict between sections 5 and 9. If there is, however, it seems necessary to apply one of the two alternatives contained in rule 5. The application of either disposes of the contention of the plaintiff in error. If the first alternative rule is applied, section 9, standing last in the statute, governs; if the second, both fall and the existing law is not altered; the Government would still have the right to appeal under the old law.

The contention of the plaintiff in error is that a provision in the statute, framed in general terms, should be taken as rendering void a later, specific provision in the same statute. For such a position there is absolutely no authority. There is not a single English or American case which can be cited in support thereof.

Position of Plaintiff in Error Considered.

Against the foregoing rules plaintiff in error sets up the following proposition, viz: That the controlling guide in determining the intent with which Congress enacted the law in question must be found in the interpretation which the language, as used in the statute, has received at common law, and the meaning it has in the Constitution of the United States. It is admitted that this proposition is entitled to consideration; it is conceded that if Congress had been legislating for a territory where the laws in existence sprang from the common law, the rule invoked by plaintiff in error would be controlling. But it is emphatically denied that, when Congress is legislating for a territory which has no historical connection with common-law countries and where the Anglo-Saxon inhabitants are almost a negligible quantity—a territory, in short, where it is known that a system of law is in force based upon the Roman law—the foregoing proposition is entitled to more weight than the elemental and common sense rule of law and statutory construction that the legislature, in the enactment of a law, is presumed to have had former laws on the same subject before it, to have been acquainted with their judicial construction, and to have passed new statutes with special reference thereto; in other words, that the legislature is always deemed to have in mind the laws in force

and the special circumstances and conditions surrounding the subject matter of the legislation.

The principle involved in the discussion of this point was brought out and fully discussed in the opinion of this court in the case of *Hurtado* v. *California*. In that case the question involved was, What was meant by the expression in the Constitution "due process of law"? The specific question before the court was whether a conviction upon an information for murder in the first degree and a sentence of death thereon were illegal by virtue of that clause of the fourteenth amendment which prohibits a State from depriving any person of life, liberty, or property without due process of law. Mr. Justice Harlan, in a dissenting opinion, quoting from the decision of this court in *Murray's Lessees* v. *Hoboken Land & Improvement Co.* (18 How., 272), stated the proposition upon which the plaintiff in error here rests his argument, as follows:

> To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been*

> *unsuited to their civil and political condition by having been acted on by them* after the settlement of this country.

Following this is a long and able argument in defense of the proposition that "due process of law" as used in the Constitution of the United States with reference to criminal procedure must receive the same interpretation which was given to it at common law.

The majority of the court, however, speaking through Mr. Justice Matthews, said in answer to the foregoing position:

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter

of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament, so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's case* (8 Rep., 115, 118a), the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and

liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim founded on the essential

> nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." (Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.)

Our contention is, therefore, that the interpretation to be given to the provision against double jeopardy contained in the act of Congress of July 1, 1902, should be in accord with the intention of Congress when that act was passed, and such intent should be gathered from the conditions existing in 1902 in the Philippine Islands rather than from conditions existing in England at the time of the adoption of Magna Charta or in North America at the time of the adoption of the Constitution of the United States, or at the time of the adoption of any of the State constitutions containing this provision against double jeopardy. The court in the case of *Hawaii* v. *Mankichi* held the intention of Congress to be to continue the existing laws in Hawaii, except so far as expressly repealed, and the intention of Congress as to existing law in the Philippine Islands should be considered the same. In enacting the fifth section of the act of Congress

of July 1, 1902, Congress inserted the various important provisions of the Bill of Rights contained in the Constitution of the United States, with two important exceptions, in the general terms in which they are usually stated, probably without actually paying much attention to what their particular effect would be in the Philippines. These general provisions have never had any precise limits placed upon their application, but have meant different things at different times and in different places. In the opinion of the court just cited it was held that their present meaning in the United States is not the same as their original meaning in England.

This court held in the *Hurtado case*, as well as in the case of *Hawaii* v. *Mankichi*, that the object of these provisions was to secure to individuals the general, substantial rights of personal liberty and property, and not a mere formal adherence to certain particular methods of criminal procedure. These provisions are, at best, general. The particular provision against double jeopardy has received widely different constructions in different States of this country. The provision, however, contained in the ninth section of the act of July 1, 1902, as to the continuation of the jurisdiction possessed by the courts of the Philippine Islands, is as specific and certain in its meaning as the English language can make it: "That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction

as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure." Certainly this language can have but one meaning to any rational mind, and that is, that the existing methods of procedure, criminal as well as civil, appellate as well as original, were to continue in force and effect in the Philippine Islands. This conclusion is rendered irresistible by the fact that no provision is made for any new method of procedure to take the place of the one then in operation. If any part of the existing mode of procedure was repealed, nothing was provided in its place.

Furthermore, the intention of Congress to secure to the Philippine Islands, by section 5 of the act of July 1, 1902, all the substantial rights of Anglo-Saxon liberty, but without giving them the common-law forms of procedure is shown by the omission to provide in that act for jury trials. The whole Anglo-Saxon theory of procedure, criminal and civil, is based upon the provision for trial by jury. The omission of the provision for jury trial renders other principles of common-law procedure inappropriate. Common-law proceedings without jury trial would be like the play of Hamlet with Hamlet left out. In every case where a statute giving the right of appeal to the Government in criminal cases has been declared unconstitutional, the Government attempted to appeal from the

verdict of a jury. The reason underlying the view that the right of appeal by the Government is in conflict with a provision against double jeopardy seems to be this: Under the common law the accused has the right to have his fate determined by a jury. The jury is the supreme authority, and when they have completed their work one jeopardy is over, viz, the jeopardy of conviction by that particular jury. A second jury would involve a second jeopardy, for one jury might convict where another would acquit. There is much soundness in this position; otherwise the State might go on experimenting until it found a jury willing and ready to convict.

All this, however, is inapplicable to the present case. No person or body has a right to render a verdict except the courts. There is no verdict or judgment rendered by a body which then forever passes out of existence. The inferior and superior courts of the Philippine Islands are merely parts of one general judicial system. The connection between these courts is far closer than it possibly can be under a jury system. The proceedings in the upper and lower courts are merely parts of the same judicial trial. The proceeding in the lower court is but one step in the case; the rights of the accused can not be determined therein, either favorably or adversely. *There is but one trial, which cannot be terminated until the decision of the supreme court is finally given, and there is but one*

putting in jeopardy. In the Philippine Islands the supreme court itself renders the verdict; under the common law procedure all the court can do is to order a new trial by a new jury, and in this connection we desire to call the attention of the court especially to the fact that the supreme court in the Philippine Islands has no original or concurrent jurisdiction to hear and try criminal cases in the first instance; its jurisdiction is only appellate; hence there can be no new trial in any proper sense of the term.

"Jeopardy" under the Common Law and Spanish Law Systems.

A comparison of the common law and Spanish law conceptions in this connection may, at first blush, appear to be academic rather than practical. Our purpose, however, is to show that the adoption in the Philippine Islands of the application of the principle as it exists in the Spanish law is not in derogation of any fundamental right guaranteed by the Constitution of the United States, or in violation of any principle of natural justice, because—

First. The principle contained in the doctrine against double jeopardy is identical in both systems, the difference being one of application only.

Second. It will be found upon examination that the Spanish law application of the principle is better supported by reason and justice than the

one found in the common law, and is better calculated to conserve the rights and well-being of the citizens of the Philippine Islands.

The Spanish law application of the principle is based upon the theory that the State has just as much right and just as much interest in having the errors of the trial court corrected by the appellate court as has the accused, and the further proposition that, under the judicial system as it exists in the Philippines, such a procedure results in no injury to the accused.

The common law application of the principle of jeopardy grew out of a state of affairs in England which has had no parallel in the history of this country. The application of the principle as it is found in the common law was a natural and necessary auxiliary of the system of trial by jury and was designed to defeat the corrupt administration of the sovereign, who had come to use the courts for the accomplishment of his own personal ends, rather than for the purposes of justice. The system of trial by jury was of no avail to defeat the aggressions and usurpations of the crown, if the verdict of the twelve men had been committed to the judgment of a pliant judiciary appointed to execute the sovereign will. In this state of things it became necessary to make jeopardy end with the verdict of the jury, and so it was incorporated into the law. From this fact, and from the *dicta* of certain judges, the idea has grown up that a trial ends be-

cause the accused has once been placed in jeopardy.[a] The truth is, the trial was declared to be at an end in order to defeat the purposes of a tyrannical sovereign.

A trial does not end because one has been in jeopardy, but jeopardy ends because there has been a legal and valid trial. The whole proposition turns upon what constitutes a trial, and that is a matter of statute and of judicial interpretation. The conditions out of which the common-law rule sprang having passed away there is no good reason why the rule itself should not yield to modification.

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[a] The rule that a criminal cause once submitted to a jury can not be submitted to another jury may be traced to a *dictum* of Coke. * * * That *dictum* was at most a statement of existing procedure, and, as such, has been repeatedly discredited in a large number of cases; and a rule of procedure in criminal law advanced during the seventeenth century can not be held to dominate the settled principles of jurisprudence in the nineteenth. The administration of criminal law as it formerly prevailed in England has justly been regarded, in some respects, as an object lesson of barbaric codes. Its continuance theoretically unchanged during the wonderful evolution of a system of civil liberty and sound jurisprudence is a marvel, not inexplicable, perhaps, but none the less strange. Judges were compelled to administer a criminal code in many ways sharply antagonistic to the system of civil liberty and justice which legislature and courts were slowly developing. It is not surprising that under such limitations they should have been acute in stretching the technics to modify the harshness of the law, and should have occasionally given utterance to *dicta* praiseworthy in view of existing conditions, but unsound when applied to conditions such as now happily prevail. General rules enunciated under such circumstances, and based on such *dicta*, are not authority for the fundamental principles of the common law of this State. At most, they are general statements touching procedure, which must yield to the necessities of justice. The uncertainty of such rules was felt, and the principles to be followed in applying them were clearly stated by Sir Michael Foster as early as 1746: "Upon the whole, my opinion is that all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases where a strict adherence would clash with those fundamental principles are to be considered as so many exceptions to it." *Kinloch's case*, Fost. C. L., 16. (*State* v. *Lee*, 27 L. R. A., 499–500.)

The maxim that no one shall be twice put in jeopardy for the same offense is universal, and is based upon the principle found in all systems of jurisprudence, viz, the necessity for finality of judicial proceedings.

The principle of finality is an essential, but it is not more essential than the principle of justice. A *final* settlement is not more vital than a *right* settlement. The accused has a natural right to be exempt from a second trial after the first has been wholly concluded, but he has no right to determine what shall constitute a trial; this is determined by considerations of public policy in each jurisdiction and is not a fundamental principle found in any system of jurisprudence.

> It needs no argument to * * * demonstrate that the natural rights of the individual, as well as the interests of public order, are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy but settle it in accordance with law. Judicious legislation for securing a full, fair, legal trial of each criminal cause is not in derogation, but in protection of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. That maxim, as we have seen, is based on the truth that a judicial proceeding lawfully carried on to

> its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the "putting in jeopardy" means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. (*State* v. *Lee*, 27 L. R. A., 499.)

If the accused has been erroneously acquitted by a trial court he has never been in real jeopardy. If there has been no vital error at *nisi prius*, an appeal from such a judgment of acquittal must needs be unsuccessful and the prisoner can not suffer thereby. If, on the other hand, the judgment is reversible, and the defendant is likely to be prejudiced by the appeal, it must necessarily be because of some error at first instance which made his trial abortive and made his jeopardy an apparent instead of a real one.

Justice Sawyer, in the case of *People* v. *Webb* (38 Cal., 230), takes a similar view:

> It is difficult to see how a party can claim to have been in jeopardy, within any reasonable signification of the terms employed in the Constitution, when the very evidence which would tend to put him in jeopardy has

> been, on his objection and demand, erroneously excluded by the court. The result is that a criminal may escape conviction by means of erroneous ruling excluding competent evidence, made at his request, and then avail himself of this acquittal, thus erroneously obtained through his own wrong, to defeat a further prosecution of the indictment.
>
> The same underlying principle of justice which demands a retrial because a juror is legally disqualified calls for a retrial when illegal evidence has been admitted or legal evidence excluded. In either case the trial is tainted, and should not support a valid final judgment. (*State* v. *Lee*, 27 L. R. A., 499.)

When the State sees proper to provide that the cause shall not necessarily be ended with the judgment of the trial court, but that further proceedings, on motion of the accused, may be had, an unjust verdict resumes its normal position of a legal nullity, and when the State provides for like proceedings on the motion of the prosecutor a similar result must follow.

The proposition was clearly stated in the case of *State* v. *Garvey* (42 Conn., 243), when the court said:

> The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends

> upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it.

It is thus seen that a law permitting an appeal on the part of the State from a judgment of acquittal in the trial court and requiring the final verdict of the court to be reached in accordance with the settled principles of law and justice before it can support a valid judgment is not in derogation of any fundamental doctrine of the common law, or inconsistent with the principle found in all systems of jurisprudence, or of the Constitution, or in violation of any principle of original justice that supports and enforces the conclusiveness of a valid, final judgment.

Conclusion.

We submit, therefore, that it can not be held that the law of procedure now in force in the Philippine Islands which gives the government, as well as the accused, the right of appeal from judgments of acquittal of the courts of first instance in criminal cases (at the conclusion of which the jeopardy of the accused ends), is repealed by the general section of the Philippine government act of July 1, 1902, which provides that "no person shall for the same offense be twice put in jeopardy of punishment," because

First. The proceeding before the court of first instance and the supreme court of the Philippine Islands are but parts of a single, continuous trial.

Second. The Spanish law principle of jeopardy now in force in the Philippine Islands is identical with the common-law principle of jeopardy in force in the United States; the difference being one of application only.

Third. It must be held that Congress, in enacting this piece of special legislation, had in view the conditions and circumstances existing in the Philippine Islands and the laws in force there on the subject of criminal procedure, and that it legislated with special reference thereto.

Fourth. It has been the policy of the United States, in legislating for all of its insular possessions, and especially in providing a government for the Philippine Islands, to change as little as possible the private laws of the islands as they existed at the time of the change of sovereignty.

Fifth. Congress can not be presumed, by the use of general terms, to have engrafted on the Roman law system of trial by judges an application of the principle against double jeopardy which is connected inseparably with the common-law system of trial by jury. This could only be done by an express, specific provision repealing unmistakably the law of procedure in force in the islands at the date of the passage of the act.

Sixth. The adoption by Congress of the Spanish law application of the principle against double jeopardy is not in derogation of any fundamental right guaranteed by the Constitution of the United States, does not violate any principle of natural justice, and is not inconsistent with the universal principle of jurisprudence which enforces the conclusiveness of a final and valid judgment.

LEBBEUS R. WILFLEY,
Attorney-General for the Philippine Islands.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THOMAS E. KEPNER, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 244.

FRED L. DORR AND EDWARD F. O'BRIEN, plaintiffs in error, v. THE UNITED STATES. } No. 583.

SECUNDINO MENDEZONA Y MENDEZONA, plaintiff in erorr, v. THE UNITED STATES. } No. 584.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF OF THE SOLICITOR-GENERAL FOR THE UNITED STATES.

THE FACTS.

No. 244.

Kepner, an attorney at law, was charged with the crime of swindling or embezzlement (*estafa*) under the criminal code in force in the Philippine Islands,[a] by appropriating to his own use the money of a client. He was tried by one of the judges of the supreme court

[a] Section 2, articles 534, 535, paragraphs 1, 5, see Appendix, p. 1.

of the islands, sitting as judge of the court of first instance, without a jury, and was acquitted on the ground that there was sufficient evidence of a bona fide claim of right to raise a reasonable doubt as to the existence of fraudulent intent. The Government appealed; motions to dismiss on the ground that the prosecution was not entitled to an appeal were denied, the court holding (Rec., p. 7) that there is no finality to the judgment of the trial court in criminal cases in the Philippines until it has been ratified by the court of last resort, and that jeopardy being the peril not of more than one trial, but of more than one punishment, there can be no danger of a second punishment until the first has been finally adjudged. On the merits, after exhaustive review of the evidence, the court declared (Rec., pp. 11–18) that Kepner was unworthy of credence and of his honorable profession; found that he sought to take a grossly unfair advantage of a confidential relation, reversed the court of first instance, adjudged the defendant guilty, and sentenced him to imprisonment, with the forfeiture of the right of suffrage and of eligibility to office, etc., in accordance with the code.

No. 583.

Dorr and O'Brien, the publisher and proprietor and the editor, respectively, of the "Manila Freedom," were accused of publishing a willful and malicious libel against Señor Legarda, a member of the Philippine Commission. The circumstances were these: On the prosecution of the editor of another paper, the defense

had offered to prove the truth of the allegations published therein, which were highly scandalous in form and substance. The judge of first instance, it seems (Rec., pp. 9, 35), had excluded the proof, but permitted the document setting forth the libellous matter in detail to be filed in the cause. The report of these proceedings in the "Manila Freedom," copying the document *totidem verbis* under headlines which contained the words "traitor, seducer, and perjurer" as applicable to Commissioner Legarda (pp. 27–29), constitute the cause of action here.

The trial proceeded before the court of first instance, and the defendants demanded a jury trial, which was refused. After demurrer and a motion to dismiss had been overruled, and upon full hearing, the defendants were found guilty and each sentenced to six months' imprisonment at hard labor and a fine of $1,000. They appealed to the supreme court of the islands, which affirmed the judgment below (pp. 34–48), holding that there is no law in the Philippine Islands entitling the defendants to a jury trial; that the caption and headlines of the article in the "Manila Freedom" constituted the offense of libel; and that the judgment is sustained by the evidence. A dissenting opinion (pp. 48–51) took the view that as the article itself was privileged (which seems also to have been assumed in the opinion of the court, but was not conceded by the Government), the headlines did not constitute libel unless there was proof or necessary inference of malice, which did not appear.

No. 584.

Mendezona, like Kepner, was charged with *estafa* or swindling. The case is well epitomized at page 8 of the record. The defendant, representing that he had a certain quantity of hemp in his warehouse, negotiated a credit, and pledged the hemp as security to the creditor. After large payments had been made on account of the loan, it was discovered that the total number of bales of hemp in the warehouse at the time of the pledge was much less than that represented by the defendant, and that part of the hemp so pledged was the property of others or had already been pledged to others. The facts are complicated; they are fully set out in the opinion of the appellate court (Rec., p. 9 *et seq.*). There were numerous banking transactions with different creditors, a mingling and substitution of collateral, showing falsity and fraud, and a final insolvency and settlement of the civil liability, in which creditors joined. A large part of the advances was made before the execution of the instrument of pledge, which, however, covered past and future advances; but fraudulent dealing and criminal liability stand out as a result of all the facts, and the finding of the appellate court is clearly justified.

After various preliminary motions had been determined, there was a plea of not guilty and a trial before the presiding judge of the court of first instance at Manila. That court leaned to the view (Rec., pp. 4–7)

that the pledge was rather a matter of form; that large credits had been obtained by the firm at that time with facility, and that the granting of the credit was not dependent upon the specific pledge of the hemp. The court's conclusion was that the charge had not been proven, and the defendant was acquitted. Upon appeal by the prosecution, the supreme court of the islands found the defendant guilty, and sentenced him to imprisonment with loss of civil rights in accordance with the code. The determination on the law was that the two essential elements of *estafa*, deceit and damage, were present; that a compromise of the civil liability did not end the criminal liability, and (upon the denial of a motion for rehearing, p. 27) that an appeal by the prosecution from a judgment of acquittal does not put a defendant twice in jeopardy.

THE ASSIGNMENTS OF ERROR.

In all three cases the right of trial by jury in criminal prosecutions in the Philippine Islands is involved. In the Kepner and Mendezona cases the question of jeopardy is presented. In the Dorr and O'Brien case there is also an inquiry on the merits as to the law of libel, which will be fully discussed by Mr. Attorney-General Wilfley. The chief points in that inquiry are whether a document presented in court, not by an attorney of record but by a bystander, in the shape of an "offer to prove," setting forth charges against character which it fairly appears were both wanton and untrue, which

were not germane to the issue under existing law, and were not accompained with the production and offer of witnesses, takes on the character of privileged matter, because a court, although apparently excluding proof (Rec., pp. 9, 35), improperly permits the document to be filed in the case; and whether, even if the body of the newspaper article containing the document obtained from the court files be privileged, the headlines epitomizing it were fair and permissible comment free from the imputation of malice. The appendix contains the law of the islands[a] in force at the time the prior libel against Commissioner Legarda was uttered, and the present law,[b] which was enacted previous to the publication now complained of. The chief changes made by the present law were to permit the truth to be shown in evidence, and to provide specifically that the report of judicial proceedings should be privileged matter.

We contend that under that law this publication was not privileged within the established rule and exceptions of our own law regarding the report of judicial proceedings; that truth does not excuse malice, which may be shown, although it is not to be implied from the mere fact of publication; and that the body of this article as well as the headlines betray the malicious character of the publication.

The errors assigned will be found at page 20 of the record in No. 244, page 52 in No. 583, and page 29 in

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[a] Penal Code, Title X, chapter 2, Appendix, p. 2.
[b] Act No. 277, Philippine Commission, Appendix, p. 3.

No. 584. Those involving the constitutional questions are reducible to these two propositions:

I. That trial by jury in criminal prosecutions in the Philippine Islands is provided and required by the Constitution and laws of the United States.

II. That the prosecution is not entitled to an appeal in a criminal case from a judgment of acquittal by a court of first instance, and that such an appeal puts a defendant twice in jeopardy, and is contrary to the Constitution and laws of the United States.

THE LAWS.

I set forth here the constitutional and statutory provisions upon which the contentions of plaintiffs in error are chiefly based.

Article III, sec. 2, cl. 3 of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

The fifth amendment to the Constitution provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The sixth amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 5 of the Philippine civil government act of July 1, 1902 (32 Stat., 691), contains the following provisions:

> That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.
>
> That no person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

Before discussing the effect of these provisions upon the questions in controversy it will be well to review briefly the state of the law in the Philippines with reference to crimes and the course of criminal procedure.

Besides the specific references to the appendix, various other matters will be found there, not particularly cited, which relate to the inquiry.

The gradual extension of the Spanish law to the Philippines is shown in a historical résumé by Señor Arellano, chief justice of the islands.[a] The judicial organization was constituted with an *audiencia* or supreme court, courts of first instance, and justices of the peace, which still form the system of courts. The ordinary criminal jurisdiction was distributed between these justices and the first instance courts, and in general an appeal lay from the former to the latter and from the latter to the audiencia. The substantial forms of a real trial existed at all periods, having in the court of first instance the "summary" stage of preliminary investigation, and the "plenary" stage of more regular and formal proceedings; and there was developed gradually a systematic law with principles, maxims, and rules of procedure all drawn from the civil law jurisprudence of the Peninsula. The substantive law of crimes was col-

[a] First report of Taft Commission: President's Message of January 5, 1901, page 225. See also introduction to translation of "Compilation of the Organic Provisions of the Administration of Justice in force in the Spanish Colonial Provinces," War Department, 1899; "Development of Law in Spain and Her Colonies," by William Wirt Howe, Albany Law Journal of August 18, 1899, page 101.

lected in the Penal Code,[a] extended to the Philippines by royal decree of September 4, 1884, and royal order of December 17, 1886.[b] The law of jurisdiction and procedure was not codified, but was to be found chiefly in the "*reglamento*" of September 26, 1835, the "*cedula*" of January 30, 1855, the provisional law of criminal procedure which accompanied the Penal Code of 1884, and the compilation of organic provisions for the administration of justice in the Spanish colonies of January 5, 1891.[c] So far as these laws were inconsistent with each other, the latest in date was to govern.

The Spanish law of crimes and procedure was adopted by our authorities in accordance with the practice of civilized nations and the rule of international law, by which the existing civil administration is maintained as far as possible during military occupation, and upon cession of territory the municipal laws continue in force unless superseded or modified by the new sovereign.[d] The language of General

[a] Translation of the Penal Code in force in the Philippines, War Department, 1900.

[b] See page 1017, Volume II, of Alcubilla's Diccionario, in Spanish.

[c] Of these, only the compilation of 1891 has been translated. (See Note *a*.) The Spanish text of the *reglamento* is to be found at page 102, Volume IV, Zamora's Biblioteca; of the cedula at page 804, Volume I, year 1888, Berriz's Diccionario; of the provisional law at page 1182, same volume; of the compilation at page 383, same work, year 1891. See Appendix, page 32.

[d] Instructions of President to general commanding, dated May 28, 1898; proclamation of the latter, dated August 14, 1898. Senate Doc., No. 208, Fifty-sixth Congress, first session, pages 85, 87; Halleck Int. Law, ch. xxxiii, sec. 14 *et seq.*; Vattel, page 388, note; Calvo, t. iv, sections 2478, 2479.

Merritt's proclamation, following the President's instructions, is:

> It is ordered that the municipal laws, such as affect private rights of persons and property, regulate local institutions, and provide for the punishment of crime shall be considered as continuing in force so far as compatible with the performance of military government, and that they be administered through the ordinary tribunals substantially as before occupation, but by officials appointed by the government of occupation.

During occupation and under the military government there were the usual reservations of jurisdiction in the military tribunals, but eventually the previous organization, jurisdiction, and mutual relations of the civil courts under their former designations were substantially restored by General Orders, Nos. 20, 21, and 22, 1899,[a] of the military governor.

The principal changes in the law of crimes and procedure made since the American occupation are contained in the following laws and orders:

General Orders, No. 58, of April 23, 1900,[b] a comprehensive code of criminal procedure, retaining the fundamental features of the Spanish system, but making various modifications and additions, including the introduction of the writ of habeas corpus.

Act No. 136 of the Philippine Commission, June

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[a] See Appendix, p. 33.

[b] See Appendix, p. 6. These orders, as subsequently amended, are still in force. Public Laws, Philippine Commission, Vol. I, pp. 1079, 1082. See also Philippine act No. 194.

11, 1901,[a] reorganizing the courts, defining their jurisdiction, and conferring upon them power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto, and habeas corpus.

Act No. 190 of the Commission, August 7, 1901, a code of civil and special procedure, containing rules for proceedings in habeas corpus.

Act No. 194 of the Commission, August 10, 1901, making a slight change in the relations of the courts of first instance to the supreme court in criminal cases.

Organic act of the Philippines, passed by Congress July 1, 1902, ratifying the previous executive action and exercise of the powers of government, recognizing the authority of the Philippine Commission to enact laws,[b] and expressly providing that section 1891, Revised Statutes, extending the Constitution and the laws of the United States, not locally inapplicable, to organized Territories, should not apply to the Philippines. This law also confirmed the creation and jurisdiction of the supreme court and courts of first instance and municipal or justices' courts of the Philippine Islands as theretofore provided, subject to the power of the island government to confer additional jurisdiction and to change the practice and method of procedure, and provided for appeal from the supreme court of the islands to this court.

An examination of the enactments above mentioned

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[a] See Appendix, p. 8.

[b] See also "Spooner resolution" of March 2, 1901. (31 Stat., 910.) Appendix, p. 11. Theretofore the authority of the Philippine government rested on the war power of the President.

will show that, while the local body of laws has been enlarged and modified, the Spanish law still constitutes the underlying substantive code and rule of procedure for the islands.

The report of the Philippine Commission for 1901, part 1, discussed the administration of justice (p. 73), explained the law for the reorganization of the courts (p. 76), and commented upon the judicial system (p. 82), stating the need for certain reforms especially in the interest of speedy procedure. In referring to the preparation of a new criminal code and a new code of criminal procedure (pp. 90–91)—which, however, have not yet been completed and adopted—the report uses the following language:

> The criminal code, unlike the code of civil procedure, is based largely upon the existing Spanish system, and only makes such changes as are deemed necessary to fit it to modern views of criminal law and to the new political relations of the people of the islands. * * * General Orders, No. 58, issued by the military governor on April 23, 1900, contains the outline of a code of criminal procedure greatly simplifying the original Spanish procedure and furnishing much needed relief temporarily; so that the work of perfecting the new code of criminal procedure is not of such pressing necessity as otherwise would be the case.

It becomes necessary, therefore, to ascertain the state of Spanish law upon the subjects of right of trial by jury, the course and right of appeal in criminal

cases, and the principle of jeopardy; and then to consider the specific modifications which have been made in that law by the orders and acts of the military and civil governments of the archipelago and by the legislation of Congress since the American occupation.

TRIAL BY JURY.

Jury trial, although foreign to civil law procedure, was introduced into France by the Code Napoleon,[a] and into Peninsular Spain by royal decree of December 22, 1872. The provisions of this decree relating to the jury were suspended, however, in 1875, and trial by jury was not restored in Spain until 1888.[b]

Neither the decree of 1872 nor the law of 1888 applied to the Philippines, and the jury system was unknown in those islands at the time of the American occupation. The laws of procedure continued to provide, as formerly, that the judges should hear all criminal causes, receive and consider the evidence, determine the guilt or innocence of the accused, fix the penalty to be imposed, and pronounce judgment.[c]

The American government in the islands has not seen fit to introduce the jury system, and Congress in the organic act omitted from the bill of rights contained therein the constitutional guaranties of indictment by a grand jury and trial by a petit jury.

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[a] Stephen's History of Criminal Law of England, Vol. I, p. 517; Code d'instruction criminelle, Liv. II, Tit. II.

[b] R. D. Dec. 22, 1872, Alcubilla, Vol. V, p. 44; D. Jan. 3, 1875, ibid., p. 48; Ley Apr. 20, 1888, ibid., p. 188.

[c] See Reglamento, 1835, arts. 51, 58; Cedula, 1855, arts. 20, 51; Provisional Law, arts. 49–52.

COURSE OF APPEAL.

Chief Justice Arellano says in his résumé, already cited, under the head of "recourses" or appeals:

> *Recourses.*—Three instances were recognized as a general rule since the most ancient times for crimes: The first ending with a judgment which, if referring to public crimes, *had either to be reviewed or could be appealed;* the second, which ended with a judgment rendered in open court (*vista*) by the *audiencias*, and against which a prayer (*suplica*) could be filed; the third, when proper, which ended in another chamber of the *audiencia* with a judgment of review (*revista*), and said sentence was definitive and carried with it a writ of execution. Since the penal code went into force [that is, under Spanish sovereignty] the third instance has been abolished, and when the recourse established by it was proper, now the recourse of "cassation" (annulment of sentence) to the supreme court of Spain took place.

The Reglamento of 1835 provides (art. 36) that judges of first instance shall have jurisdiction to hear in first instance all ordinary criminal causes arising in their respective districts; that (art. 51) said judges shall conduct such causes through the "summary" and "plenary" stages to judgment upon the merits, unless the proceedings be sooner quashed; that all orders of quashal and all judgments, whether an appeal be taken from them or not, in cases of crimes for which the law prescribes a corporal penalty, shall be reported to the superior court or *audiencia* for revi-

sion (the entire record, including a transcript of all the evidence, being sent up); that *either party* may appeal from judgments in cases of lesser crimes, in which event the record shall be sent to the *audiencia* in the same manner as aforesaid, but if no appeal be taken the judgment shall be considered final and carried into effect immediately; that (chapter 4) the *audiencia* shall hear all cases sent up for revision and all cases appealed, the parties being cited to be present, and after such hearing shall pronounce judgment; that, if the judgment below and the judgment in second instance differ in any particular, a third hearing may be had, the judgment in which shall be final. No provision is made for a resort to the supreme court at Madrid, except that the judges of the *audiencia* may obtain advice from said supreme court in cases of doubt upon questions of law.

The cedula of 1855 makes no material change in these respects. It repeats (art. 51) the provision that *audiencias* shall have jurisdiction to hear in second instance all criminal cases sent up for revision or on appeal, and (art. 58) continues the right of a third hearing upon petition. It provides specifically (art. 166) for the interposition of appeals in criminal cases by prosecuting officers.

The provisional law of 1884–1886 is silent as to the relations of the court of first instance with the audiencia (except in the case of orders of commitment, "*autos de prision*"), but makes an important change in the criminal proceedings by abolishing (art. 53) the right

of a third hearing and substituting in its place an appeal in cassation on matter of law, which might be taken by the prosecution, as well as by the defense (art. 63), to the supreme court at Madrid.

The Compilation of 1891 relates chiefly to the personnel of the courts. Chapter XI, entitled "Unity and Dependence of the Department of Public Prosecution," sets forth the subordination of lower prosecuting officers to their superiors, and prescribes that every *fiscal* or prosecuting attorney shall, among other things (art. 458, par. 5), "enter in the proper time and form, when not instructed to the contrary, appeals proper in matters in which he takes part, without prejudice to what his superior may decide as to their prosecution."

It is clear from this review of the law—and we know it to be true as a matter of fact—that at the time of the American occupation all cases of serious crimes, whether resulting in conviction or acquittal, went up from the court of first instance to the *audiencia* by transmission of the entire record, including a transcript of the evidence; that in cases of lesser crimes the same result could be obtained by either party by means of an appeal; that the *audiencia* reviewed the entire case, in matter of fact as well as of law, and pronounced judgment; and that an appeal in cassation lay to the supreme court at Madrid, and was available to either party. The latter appeal was necessarily cut off by the transfer of sovereignty to the United States.

The changes made by American legislation are as follows:

General Orders, No. 58, prescribe a course of procedure in courts of first instance somewhat simpler than, but differing in no essential particular from, the Spanish procedure; provide (sec. 32) that all the oral testimony shall be reduced to writing and signed by the witnesses; that (sec. 43) in all cases of final judgments and in all cases formerly provided for by law an appeal shall lie from courts of first instance to the supreme court (*audiencia*) of the islands; that (sec. 44) *either party* may take such appeal, and that the United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint and from an order dismissing an information or complaint; and that (sec. 50) it shall not be necessary, unless an appeal be taken, to forward to the supreme court the record of any case in which there shall have been an acquittal or in which the sentence imposed shall not exceed confinement in prison for one year or a fine of 250 pesos, but that all other cases shall be sent to the supreme court and thereafter take the same course as already provided by law.

Act No. 194 of the Philippine Commission amends section 50 of General Orders, No. 58, and provides that unless there be an appeal the record shall not be sent up to the supreme court, except in cases where the accused is found guilty and the penalty of death is imposed.

The organic act of July 1, 1902, makes no specific change in criminal proceedings, except the one already

noted above in providing for a writ of error from this court to the supreme court of the Philippines.

It appears, therefore, that at the present time the right of the prosecution to appeal from final judgments of courts of first instance to the supreme court of the islands exists in every case, the supreme court having jurisdiction to review the facts and the law, and to pronounce final judgment; that there is a review of the record in the supreme court, without an appeal being taken, in the single case of conviction of a capital crime, that the right of appeal by the prosecution existed under the Spanish law at the time of the American occupation, not only from the court of first instance to the *audiencia*, but also from the *audiencia*, in cassation, to the supreme court at Madrid; and that, under Spanish law, not only capital cases resulting in conviction went up to the *audiencia* as of course, but likewise all other cases of serious crimes, whether resulting in conviction or acquittal.

JEOPARDY.

The doctrine that a man shall not be twice put in jeopardy for the same offense is well known in the civil law. Under the caption, "*Non bis in idem*" in Bouvier's Dictionary, it is said:

> *Non bis in idem.* In the civil law. A phrase which signifies that no one shall be twice tried for the same offense, that is that when a party accused has been once tried by a tribunal *in the last resort* and there convicted or acquitted, he shall not again be tried.

In Merlin's "Repertoire," to which Bouvier refers, it is said (Vol. XI, p. 528):

> *Non bis in idem*, a maxim of law, or rather of practice, the meaning of which is that an accused who has been adjudged, condemned, or acquitted by an *arrêt* or other judgment rendered *in last resort*, or which has acquired the force of *chose jugée*, can not be again prosecuted by reason of the same act.

Merlin and Bouvier cite the following provision of the Code of Justinian, which is also referred to by the court of cassation of France as the basis of the doctrine of jeopardy.[a]

> He who has been accused of a crime can not be complained of for the same offense by another person. But if more than one offense arise from the same act and the offender has been accused of one offense, it is not prohibited that complaint be made against him by another person for the other offense.
>
> Cod., lib. ix, tit. ii, l. 9.

This principle continued to be recognized in French law, was made a part of the constitution of 1791, of the constitution of the year III, of the code of 3 Brumaire, year IV, and, finally, of the Napoleonic "*code d'instruction criminelle*," which declares:

> Art. 360. No person legally acquitted can be a second time arrested or accused by reason of the same act.

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[a] See Devilleneuve and Gilbert's *Table générale alphabétique du Recueil général des lois et des arrêts*, vol. 3, p. 399.

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255) and the Siete Partidas (A. D. 1263).

> After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases).
>
> Fuero Real, lib. iv, tit. xxi, 1. 13.
>
> If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of that offense (except in certain cases).
>
> Siete Partidas, Part. VII, tit. i, l. xii.

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola, in 1848, it is said, in considering the persons who may be accused of crime:

> It is another of the general exceptions that a person can not be accused who has formerly been accused and adjudged of the same crime; since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law.
>
> Tomo I, pag. 511.

The identity of the law of jeopardy in the Roman, French, and Spanish systems is thus manifest. The thing forbidden in each system is the second *accusation* of a person for an offense of which he has already been acquitted. An appeal by the State being by no possible construction a second accusation, it followed that such an appeal was not a second putting in jeop-

ardy, and we find, therefore, that the law in Spain and France [a] permitted such appeal by the State.

The only specific legislation that has been had upon the subject of jeopardy in the Philippines since the American occupation is the provision of the organic act above set forth.

ARGUMENT.

I.

The provisions of the Constitution respecting trial by jury do not apply to the Philippine Islands.

The Insular Cases in general laid down these propositions: That the power to acquire territory involves the power to govern and dispose of it; that Congress, in legislating for newly acquired territory, possesses plenary power, and is not restrained from the widest latitude of discretion, although there are inherent and fundamental limitations which are not to be transcended; that not every clause of the Constitution attaches to the Territories as well as the States, and there is a clear distinction between such prohibitions as go to the very root of the power of Congress at all and such as are operative throughout the United States; that besides the express limitations which are applicable, there may be fundamental restrictions which can not be transgressed although not expressed. The declarations in the Mormon Church case were cited

[a] The provisions of law allowing such appeal in the Philippines have already been cited. In the Peninsula and in France, where trial is by jury and in single instance, an appeal in cassation is allowed to the State as well as to the accused. See Code d'inst. crim., arts. 202, 206, 373; Ley, Apr. 20, 1888, art. 118.

among other authorities in support of these propositions, and as to the nature of such fundamental and universal restrictions the opinions of the majority of the court said:

> Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed" and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the first amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peacefully assemble and to petition the Government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application. * * * We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free

> access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage [citing *Minor* v. *Happersett*, 21 Wall., 162], and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals. (Per Mr. Justice Brown in *Downes* v. *Bidwell*, 182 U. S., 277, 282–283.)
>
> Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the Government all power on a given subject that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character can not be under any circumstances transcended, because of the complete absence of power. (Per Mr. Justice White, id., 294–295.)

Earlier authorities discussing the extent to which former laws are necessarily displaced upon a transfer

of sovereignty to this country because of our constitutional principles and institutions indicated the same inquiry, but laid down no precise rule. (*Railroad Co.* v. *McGlinn*, 114 U. S., 542; Halleck's Int. Law, 1st ed., c. 33, sec. 14.)

The question, then, is whether the express limitations respecting trial by jury apply of their own force in the Philippines as a vital and inherent principle of our free government everywhere and at all times, or whether they constitute simply a remedial right and a particular method of procedure peculiar to our Anglo-Saxon jurisprudence, but not essential to the protection of individual liberty.

We think this question was answered in the Mankichi case. The Hawaiian government and jurisprudence were founded upon the common law and our own ideas and principles. The act of annexation continued in force only those existing laws which were not contrary to the Constitution, and yet the law materially modifying the common-law rules respecting trial by jury was held to be in force until Congress explicitly extended the Constitution and provided our own system of grand and petit juries. The court advanced a step further in defining what rules and principles do necessarily restrict our government of Territories, and said (*Hawaii* v. *Mankichi*, 190 U. S., 197, 217–218):

> It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they

> would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without due process, or confiscating private property for public use without compensation, remain in force after the annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.

It thus seems clear that while most of the privileges and immunities of the Bill of Rights apply to territories from the moment of acquisition, trial by jury does not.

This institution is not a necessary and fundamental right, but concerns procedure mainly, and the guarantee does not apply to newly acquired territory. The necessary deduction from that case is that if there is a substantial modification of the jury system, or no jury system at all, but some other adequate system of trial in due and regular course, which is long established and suited to the needs of the inhabitants, that is sufficient, and those particular constitutional provisions do not apply until Congress sees fit to put them in force. Such a system is due process of law, and that idea is recognized by the bill of rights in the act of 1902, which substitutes for the grand jury guarantee the provision "that no person shall be held to answer for a criminal offense without due process of law."

That is, of course, just this case. There is no trial by jury at all; that mode was entirely unknown to the civil law in general and as administered in the Philippines, just as accusation by grand jury is unknown. But the time-honored method of trial in the civil law has been always in vogue, is familiar to the people, and is perfectly adequate to all the demands of justice. Whatever might be said of the remote past, when all judicial systems and officers were too much under the control of absolute power; or whatever might be said of imperfections in modern administration at the hands of this or that nation, it is idle to say that under the full safeguards for the rights of the defense which we have imposed upon our government in the Philippines, the civil law, with its mode of accusation upon formal

complaint, trial before a judge alone, and in an established course of review, does not furnish an adequate, effective, and just system.

It is not necessary for me to dwell on the *claims* of the locality to its own system, "venerable by time and custom," to borrow the phrase of Mr. Justice Matthews, describing the institutions upon which our Constitution and laws were founded. (*Hurtado* v. *California*, 110 U. S., 516, 521.) If our mode of trial does not exclusively embody the "principles of public liberty and private right, which lie at the foundation of all free government" (*ib.*), to which our Government *must* be consistent everywhere, then to introduce the jury system instantly might well be to confer a blessing of doubtful wisdom and beneficence upon an unwilling people. "While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation." (*Holden* v. *Hardy*, 169 U. S., 366, 387.)

All these ideas—the respect which we are bound to feel for the institutions of the civil law, the realization that we do not possess a monopoly of wisdom and justice, the rights of new peoples coming under our sovereignty not to be unnecessarily interfered with in respect to their historical institutions and jurisprudence—have been luminously expressed by the court in opinions of great ability and force.

In the *Hurtado* case the court said (110 U. S., 529, 530, 531):

> But to hold that such a characteristic is essential to due process of law would be to deny

every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. * * * It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. * * *

And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideals and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation

> and system will mold and shape it into new and not less useful forms.

In *Holden* v. *Hardy* (169 U. S., 366, 389) the Court said:

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

Nor is it necessary to dwell upon the inconveniences and mischiefs which would result from the opposite view. The court took such considerations into account in the Mankichi case. Here the mischiefs would be even greater; they would be revolutionary. It is impossible for the mind to conceive the instant introduction and working of the jury system in the Philippines, with its heterogeneous population bred to a different method and containing many primitive tribes inhabiting remote and unsettled districts.

I need not review at length the other cases involving trial by jury which the court has adjudged. In the Insular Cases these authorities were analyzed and distinguished or reconciled, and the doctrines to be

deduced from them were thus summarized in the Mankichi case (190 U. S., pp. 211, 220):

> The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized territories (*Webster* v. *Reid*, 11 How., 437; *American Pub. Co.* v. *Fisher*, 166 U. S., 46; *Thompson* v. *Utah*, 170 U. S., 343), though we have also held that the States, when once admitted as such, may dispense with grand juries (*Hurtado* v. *California*, 110 U. S., 516), and perhaps also allow verdicts to be rendered by less than a unanimous vote. (*American Pub. Co.* v. *Fisher*, 166 U. S., 46; *Thompson* v. *Utah*, 170 U. S., 343.) [Per Mr. Justice Brown.]
>
> * * * * *
>
> The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. (*Hurtado* v. *California*, 110 U. S., 516; *Ross's case*, 140 U. S., 473; *Bolln* v. *Nebraska*, 176 U. S., 83, and cases cited on page 86; *Maxwell* v. *Dow*, 176 U. S., 584, and *Downes* v. *Bidwell*, *supra*.) [Per Mr. Justice White.]

Taking them all together, the previous cases establish these propositions: That the first eight amend-

ments operate as restraints upon Congress and the National Government and not upon the States; that, accordingly, while trial by jury, whether in civil or criminal cases, is a necessary rule in the courts of the United States, and this rule applies to the District of Columbia and the organized Territories to which the Constitution and laws of the United States have been extended, nevertheless the States are not restrained by these constitutional limitations and may provide for other modes of accusation and trial consistently with due process of law and the principles of free government. The Mankichi case and the present cases add another category, viz, of territory not organized within the rule.

The power of Congress here is plenary. Congress has exercised it by maintaining all the guarantees, vital and necessary to free government, which our war power had imposed upon itself at the outset. Congress is doubtless subject to any similar restraint, though unexpressed, which is inherent and essential in the principles of public liberty and private right, but Congress has not only not extended the Constitution and laws in general of the United States, but has affirmatively withheld them, and intentionally has not included trial by jury in the bill of rights conferred. Under these circumstances and under the decisions as interpreted and applied by the Insular cases, the logic is certain and inevitable that the right of trial by jury does not apply to the Philippine Islands.

The most recent authorities on the subject of procedure by grand and petit juries in the States are *Bolln*

v. *Nebraska* (176 U. S., 83), and *Maxwell* v. *Dow* (id., 581). In these cases the previous decisions are reviewed and affirmed, and the court fully sustains the right of the people of a State to determine for themselves the proper method of accusation and trial of crimes unrestrained by the provisions of the Constitution of the United States on the subject. "Trial by jury has never been affirmed to be a necessary requisite of due process of law." "It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion that they are much better judges of what they ought to have in these respects than anyone else can be." (*Maxwell* v. *Dow*, pp. 603, 604.) It is in reason equally just and proper that an inherited and approved mode of trial should be preserved to a locality coming under our territorial government. The presumption is natural and necessary that the inhabitants of such a new territory prefer the accustomed mode of their jurisprudence. It will be time enough to consider a change when, as is proposed for the near future, they are enabled to express a choice upon this and other subjects through a representative assembly. In the meantime their development and training in our principles and methods in order to fit them for such choice should proceed as far as possible through their own established forms of civil institutions. There ought not to be great disturbances and violent changes, and if the right to retain inherited modes and forms is as natural and as consonant with reason and principle as the right of the people of a

State of the Union freely to adopt their own methods, the court has closed the logical circle by the recent determinations that not all the provisions of the Constitution apply to such territories, and that our jury mode of accusation and trial is not a fundamental limitation therein.

It seems certain from previous adjudications that inherent principles of individual liberty and free government are fully observed if there is "a forensic trial under a broad and general law operating equally upon every member of [the] community;" or, to quote a well-known paraphrase of the clause from Magna Charta, "*nisi per legale judicium*," etc., "but by the judgment of his peers, *or by some other legal process or proceeding adapted by the law to the nature of the case.*" (See citations in *Hurtado case*, 110 U. S., 526, 527.)

The Philippine mode is within the idea contained in Mr. Webster's definition of law, and constitutes "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

II.

An appeal in a criminal case from a judgment of acquittal by a court of first instance in the Philippine Islands is valid, and such an appeal does not put a defendant twice in jeopardy contrary to the Constitution and laws of the United States.

The question under the Constitution is merged in the question under the act. The inquiry is, What does the provision mean as applied to Philippine conditions; what was the intention of Congress? The

principle is ancient and inherent in all just laws as part of the universal law of reason and conscience, and manifestly in some sense is a fundamental limitation on our Government everywhere.

It is unnecessary to cite authorities for the conceded proposition that in our jurisprudence the rule forbids in general a second trial as well as second punishment, and denies an appeal to the State unless by positive enactment such right of review on questions of law is conferred.

The rules and the qualifications are stated in *Ex parte Lange* (18 Wall., 163), *United States* v. *Sanges* (144 U. S., 310), *United States* v. *Gibert* (2 Sumn., 19), by the text-books on constitutional and criminal law, and in numerous other authorities therein cited.

It is equally evident, however, that the scope and effect of our rules are essentially dependent upon the peculiar function and conclusive authority of a jury. The finality of a verdict against the prosecution rules the whole subject.

In one of the State cases where an appeal on questions of law was allowed to the prosecution under the State statute (*State* v. *Lee*, 65 Conn., 265, 272), the court said:

> The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential, but not more essential than the principle of justice. A final settlement is not more vital than a right settlement.

It was held that the maxim on jeopardy—

> is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the State deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure; while such prosecution remains undetermined the one jeopardy has not been exhausted. * * * The rule as formulated by this court in *State* v. *Garvey* [42 Conn., 233] rests upon solid foundations. "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

These passages bring us to the theory of the Philippines law. All laws forbid a second punishment, and there is of course no such danger here. The Roman law, like our own, forbids a second trial, but in that law the rule operates after trial by the tribunal of last resort and conviction or acquittal there. This is the finality which is "the most essential effect of judicial decisions."

In other statements of the doctrine the thing forbidden is a second accusation. An appeal by the State

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can not be regarded by any possible construction as either a new trial or new accusation, and therefore is not a second putting in jeopardy. This is undoubtedly the view in France and Spain, where such appeal is and apparently always has been allowed. The trial is a continuous and unitary thing until the review is completed. In both countries in recent years there has been a limited use of trial by jury, but an appeal in that case also is allowed to the State as well as the accused. This use of the jury is confined to the Peninsula and was never extended to the colonial possessions of Spain. The authority of a jury's verdict is the controlling factor in our conception of finality, in contrast with the rules of Spanish jurisprudence.

It is certain that under the system we found in the Philippines the view of jeopardy was as I have stated; all serious crimes were necessarily reviewed by the *audiencia*, whether acquittal or conviction resulted below, and in lesser crimes either party had the right of appeal. The entire case was reviewed upon a complete transcript as to matters of fact as well as law, and the case was not final, the trial ended, and the jeopardy complete until the *audiencia* had pronounced judgment. Then, in the Spanish law, as much as in our own, the principle supervened and forbade additional punishment, second trial, or new accusation for the same offense. The American legislation has made no substantial changes in these rules and proceedings. Such changes as have been made are in favor of the accused. Acquittal of a serious crime is not now nec-

essarily reviewed as before, but only in case the prosecution elects to appeal.

The entire policy of our Government has properly been to regard and preserve the local institutions as far as possible. Congress has recognized and sustained this policy. We have prescribed a bill of rights; we have imported our great remedial writs, and we have carefully laid down the full rights of defense in the existing law of criminal procedure. It was noted in the Hurtado case that the State under its statute "carefully considers and guards the substantial interests of the prisoner;" and the court seems to have looked upon this as an additional reason for not disturbing the method of accusation adopted by the State, being due process.

Here a State has not adopted a different system or methods, but we found them immemorially established in a territory of diverse traditions from our own.

We have thus recognized and maintained existing institutions and simply adjusted to them those rights and benefits of our laws which were deemed to be appropriate to the local conditions and essential. The act of Congress manifests no intention to displace the foundations and framework of that civil life, but on the contrary manifests a clear intention to approve and sustain the established scheme as modified and enlarged under our authority. There are many evidences of this throughout the act of 1902. For instance, in this very matter the prohibition of the act is of a second "jeopardy of punishment," differing from the lan-

guage of the Constitution. I do not argue, of course, that the only thing forbidden is a second punishment, for the prohibition of second trial is because then there would be the hazard, the danger of a second punishment; the risk would be run a second time. Nevertheless, those words, stripped of English and American interpretation, and literally construed permit the review of a judgment of acquittal. The variation from the language of the Constitution may well have been with a purpose of recognizing the peculiar Philippine theory of trial and course of appeal and of adjusting our doctrine of jeopardy to them. This conception indeed appears in the view of the court below, where they declare that the act of Congress is consistent with the Philippine law, and say (Kepner record, p. 10):

> To be in jeopardy in the legal sense it is not sufficient that the danger should have begun. It must also have ended before the plea can be made effectual. Jeopardy is not the peril of more than one trial, but the peril of more than one punishment, and in the same proceeding there can be no danger of a *second* punishment until the first has been *finally* adjudged.

But this is the same as to say that here there has *not* been more than one trial, and that contention I wish to emphasize and enforce as the true theory of the matter. The original trial is a unitary and continuous thing, and is not complete until the appellate court has pronounced judgment.

We do not rest merely on the usual and necessary presumption that Congress was aware of the situation and legislated with full knowledge of all the facts. The history of our Government in the islands from the beginning, the nature of the local laws and institutions, the continuation and modification of them, the reorganization of the municipal government and of the courts in the form which our authorities found and preserved—all these things and the entire series of transactions and developments have been spread before Congress in numberless reports and Philippine enactments, through investigations, and by public documents. Congress studied the Philippine situation with particular care and great deliberation, and acted upon full information. It is incredible that Congress meant to impose the pecular conception and effect of the rule on jeopardy which is embedded in our law simply because of its relation to trial by jury. The principles are essentially connected here, and neither the one nor the other has any place in the Philippine Islands. Obeying the rule, as we have done, in its inherent meaning and fundamental scope, and observing its due force and effect as a recognized part of Spanish law and the Philippine system, we interpret the act of Congress according to its true meaning and purpose. It is manifest that, if the contrary view is sustained, mischiefs and confusion would follow like those which would be consequent upon the immediate introduction of grand and petit juries. The same reasons are apparent for a construction which will

avoid if possible absurd or mischievous or unreasonable results as were found in the Mankichi case.

It is certain that Congress did not intend by the jeopardy clause to introduce trial by jury. The way to that was open and easy, but Congress intentionally failed to take it. It is equally and consequently certain, I think, that Congress did not intend by that clause to repeal the Philippine laws by inference and abolish this essential part of that scheme, intimately entwined as it is with their historic body of criminal jurisprudence. The single question is, Did Congress intend, with the jeopardy clause, to wipe out by mere remote implication the entire established course of State appeals in criminal cases? I do not believe it is possible to maintain this view. Congress never meant to declare in this way, or in any other way thus far, that although trial by jury was definitely withheld, and although judgments in first instance were only interlocutory in Philippine law, nevertheless the finding of acquittal by the single judge of first instance should be final and irrevocable.

It will be evident to the court, I believe, on comparison of the views of the lower court in the Kepner and Mendezona cases with the careful weighing and exhaustive analysis by the appellate court *in banc*, that this result would be unfortunate, and would often defeat, rather than secure, justice. The verdict of a jury not being involved, I do not believe that any candid mind could maintain that such deliberate review by the entire bench of the supreme tribunal will not serve

the ends of justice and constitute a proper and sufficient safeguard to the individual, as well as protection to the community. Looking at the matter dispassionately, and free from predilection, is it not reasonable that the concurrence of all or a majority of the supreme judges will be more likely to reach the correct and just result than the unchallenged conclusion of one inferior judge?

Preeminently the construction of the act should keep in view the maxim *ut res magis valeat quam pereat.* If Congress had desired and intended to give to our government in the Philippines the mandate to strike down appeals by the prosecution in criminal cases, they would have done so in clear and unmistakable language. They knew exactly what had been done in this matter—what the old law was, and that it had been continued in force. It is certain that the law-abiding people of the Philippines are attached by sentiments of reverence as well as by the natural prejudices of custom and tradition to their ancient jurisprudence. I can say nothing in favor of its maintenance half so forcible and convincing as the passages from the learned opinions in *Hurtado* v. *California* and *Holden* v. *Hardy* which I have already quoted. These considerations constitute a claim which I respectfully submit should be carefully regarded. We ought not to dispossess the Philippine people of their own. We found these institutions established and adequate to the judicial side of orderly civilized government. The manifest failures of Spain were not in this field. There is due process

within our own fundamental guarantees and by our own tests. The system is sufficient for the full demands of distributive justice. The law is equal and operates upon all alike. It is as right for this Government to preserve the essential character of the structure as a possession and cherished institution of the inhabitants as it is for a State to adopt just such institutions (and the court has said a State may do so, per Mr. Justice Bradley in *Missouri* v. *Lewis*, 101 U. S., 22, 31) upon the desires and demands of its people.

The *Ross* case (140 U. S., 453, 464) says that we need not take a jury to a foreign country to try a citizen who has committed a crime; nor do we need to take a jury and the accompanying train of doctrines to this territory of the United States for that purpose. Especially in that territory, where we are peculiarly bound to show, and are professing and endeavoring to show, the highest standards of public and private conduct, citizens of the United States who choose to misconduct themselves and dishonor their country, as well as other residents, alien and native alike, may well be left to the law and the courts before which their deeds bring them. Justice and the public interest have rights as well as the defense—for the rights of which, indeed, we have amply provided. If the procedure is novel to our ideas, and the punishment under it may be severe, that is a matter to look to before one goes to the Philippines or commits a crime there. A system should not be overthrown for any such reasons, or unless it is plainly inconsistent with public liberty and individual right.

I submit that this is not so; that the Philippine laws respecting criminal trials and appeals are entirely harmonious with the necessary principles of free government, and that all the proceedings taken herein were due and legal and were not forbidden by the Constitution and laws of the United States.

HENRY M. HOYT,
Solicitor-General.

O

APPENDIX.

(A) Extracts from the Penal Code in force in the Philippines.

Title XIII.

Chapter IV. Section II. *Swindles and other false pretenses.*

Article 534. A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

1. With the penalty of *arresto mayor* in its minimum and medium degrees if the fraud should not exceed 250 pesetas in amount.

2. With that of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.

3. With that of *presidio correccional* in its minimum and medium degrees if it should exceed 6,250 pesetas.

Article 535. The following shall incur the penalties of the preceding articles:

1. He who shall defraud others by using a fictitious name, by assuming fictitious power, influence, or attributes, or by pretending to possess imaginary property, credit, commission, enterprises, or business, or by using any other similar deceit that is not one of those mentioned in the following cases.

* * * * *

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5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

The penalties shall be imposed in their maximum degree in case of deposits made under stress or necessity.

(B) Extracts from the prior law as to libel.

Title X.

Chapter II. *Contumely.*

Article 456. Contumely includes every expression pronounced, or action executed, with a view to dishonoring or holding up to contempt another person.

Article 457. The following are grave acts of contumely:

1. The imputation of a crime of those subject to prosecution at the instance of the Government (*de officio*).

2. That of a vice or a lack of morality, the consequences of which might considerably damage the fame, credit, or interest of the person offended.

3. Acts of contumely which by their nature, occasion, or circumstance, are ignominious in public opinion.

4. Those which reasonably deserve the classification of grave, in view of the condition, dignity, and personal circumstances of the offended party and the offender.

* * * * *

Article 460. A person charged with acts of contumely shall not be allowed to furnish evidence tending to

prove the truth of his imputations, unless they shall have been directed at public officers about matters concerning the performance of their duties.

In such case the defendant shall be acquitted if he prove the truth of his imputations.

(C) The present Philippine libel law.

[No. 277.]

AN ACT defining the law of libel and threats to publish a libel, making libel and threats to publish a libel misdemeanors, giving a right of civil action therefor, and making obscene or indecent publications misdemeanors.

By authority of the President of the United States, be it enacted by the United States Philippine Commission that:

SECTION 1. A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue or reputation, or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule.

* * * * *

SEC. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defense, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends.

* * * * *

SEC. 6. Every author, editor, or proprietor of any book, newspaper, or serial publication is chargeable

with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same.

SEC. 7. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

* * * * *

Enacted, October 24, 1901.

(D) President McKinley's instructions to the Philippine Commission, of April 7, 1900.

The instructions to the Philippine Commission, through the Secretary of War, contained the following provisions:

"Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this Commission, to be thereafter exercised by them in the place and stead of the military governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for * * * the organization and es-

tablishment of courts. * * * Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

The Executive Order of June 21, 1901, directed that:

"On and after the 4th day of July, 1901, until it shall be otherwise ordered, the president of the Philippine Commission will exercise the executive authority

in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the military governor of the Philippines, and to that end the Hon. William H. Taft, president of the said Commission, is hereby appointed civil governor of the Philippine Islands. Such executive authority will be exercised under, and in conformity to, the instructions to the Philippine Commissioners, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States."

(E) General Orders, No. 58, of 1900.

General Orders, No. 58. Manila, P. I., April 23, 1900.

In the interests of justice and to safeguard the civil liberties of the inhabitants of these islands, the criminal code of procedure now in force therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:

* * * * *

SEC. 3. All public offences triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

* * * * *

Rights of accused at the trial.

SEC. 15. In all criminal prosecutions the defendant shall be entitled:

1. To appear and defend in person and by counsel at every stage of the proceedings.

2. To be informed of the nature and cause of the accusation.

3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or

refusal to be a witness shall not in any manner prejudice or be used against him.

4. To be exempt from testifying against himself.

5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the accused or his counsel, the defense having had an opportunity to cross-examine the witness, the deposition of the latter may be read, upon satisfactory proof to the court that he is dead or insane, or can not with due diligence be found in the islands.

6. To have compulsory process issue for obtaining witnesses in his own favor.

7. To have a speedy and public trial.

8. To have the right of appeal in all cases.

* * * * *

SEC. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court as hereinafter prescribed. * * *

SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

* * * * *

SEC. 50. It shall not be necessary to forward to the supreme court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos,

exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had. The record of all cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the supreme court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 1,250 pesos, or in which an appeal shall have been taken shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law. Cases forwarded to the supreme court involving sentences less serious than those hereinbefore last mentioned, and not appealed, shall be referred by the clerk to the ministerio fiscal for consideration, and if the latter return the same concurring in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the ministerio fiscal shall not concur in the sentence the case shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law when that officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the court, without the necessity of a further defense or hearing, when that officer recommends a lighter sentence.

(F) No. 136. An act providing for the organization of courts in the Philippine Islands.

* * * * *

SEC. 2. The judicial power of the government of the Philippine Islands shall be vested in a supreme court,

courts of first instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record.

* * * * *

SEC. 16. The jurisdiction of the supreme court shall be of two kinds:

1. Original; and
2. Appellate.

SEC. 17. The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

SEC. 18. The supreme court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the supreme court.

SEC. 19. The supreme court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

* * * * *

SEC. 39. The existing audiencia or supreme court is hereby abolished, and the supreme court provided by this act is substituted in place thereof.

* * * * *

SEC. 55. The jurisdiction of courts of first instance shall be of two kinds:

1. Original; and
2. Appellate.

SEC. 56. Courts of first instance shall have original jurisdiction. * * * 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * *

SEC. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

SEC. 66. There shall be courts of justice of the peace as in this section provided:

1. The existing courts of justices of the peace, established by military orders since the thirteenth day of August, eighteen hundred and ninety-eight, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the Commission.

2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justices of the peace shall be established in every municipality thereof which shall be organized under the Municipal Code, or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of the Municipal Code.

* * * * *

SEC. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offenses arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of one hundred dollars; * * *

(G) No. 194. An act conferring jurisdiction on justices of the peace, etc.

SEC. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance. * * *

SEC. 4. So much of section fifty of said General Order number fifty-eight as requires courts of first instance, or clerks thereof, to forward to the supreme court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such court of first instance, is hereby repealed, and it shall not be necessary to forward to the supreme court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the supreme court for investigation and judgment, as law and justice shall dictate.

(H) The "Spooner Resolution," act of March 2, 1901.

All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons, and shall be

exercised in such manner as the President of the United States shall direct for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion. * * *

Until a permanent government shall have been established in said archipelago full reports shall be made to Congress on or before the first day of each regular session of all legislative acts and proceedings of the temporary government instituted under the provisions hereof; and full reports of the acts and doings of said government, and as to the condition of the archipelago and of its people, shall be made to the President, including all information which may be useful to the Congress in providing for a more permanent government. * * *

(1) Act of Congress of July 1, 1902, "temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive order dated June

twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled "An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

Future appointments of civil governor, vice-governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

* * * * *

SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

That no person shall be held to answer for a criminal offense without due process of law; and no person for

the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.

That no ex post facto law or bill of attainder shall be enacted.

That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign State.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people

peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and whorship, without discrimination or preference, shall forever be allowed.

That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

That the rule of taxation in said islands shall be uniform.

That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

* * * * *

SEC. 9. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the supreme court shall hereafter be

appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the Commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the supreme court and courts of first instance shall not be changed except by act of Congress.

SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controvery exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States.

(J) Section 1891, Revised Statutes.

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

(K) An act to establish trial by jury in Porto Rico.

Be it enacted by the legislative assembly of Porto Rico:

SECTION 1. The right of trial by jury is hereby established in Porto Rico, and the district courts are hereby vested with jurisdiction to grant trial by jury.

SEC. 2. If any person is charged with a crime by a prosecuting attorney or by a grand jury, the punishment for which is capital punishment or two years or more confinement in any penal institution of the island, he may demand a trial by jury only in the district court having jurisdiction, and it shall be granted him under the following provisions:

SEC. 3. Any person so charged, shall, if he elect to have a jury, announce such election to the court, through his counsel, or by his own statement; such election shall be made at least two days before the day set for the trial for the crime with which he is charged; and if not made before that time, he shall be deemed to have waived the right to trial by jury, in which case he shall be tried by the court.

* * * * *

Approved, January 12, 1901.

(L) Extracts from the report of the Attorney-General of Porto Rico to the Attorney-General of the United States, dated November 10, 1901.

Although the jury system in criminal cases has been in force in Spain for thirty years or more, the right of

a trial by jury was never granted to the province of Porto Rico.

The first act passed by the first legislative assembly that ever sat in this island to represent its people was an act establishing the right of trial by jury in any criminal case involving capital punishment or confinement for two years or more in a penal institution.

It is not peremptory, but the act confers that privilege upon the accused; he may elect at any time within two days before the case is set for trial whether he shall be tried by a jury or by the court.

* * * Up to the date of this report, however, there has been no trial by jury in a criminal case in the history of the island, so far as I am advised Although the law has been in force now for nearly seven months, there have been but ten demands for trial by jury. This is doubtless due to several causes. In the first place there is a natural disinclination on the part of the judges and of the lawyers to enter upon a system so radically new. * * *

Varying opinions have been expressed as to the outcome of the experiment. Some of the wisest lawyers and most experienced judges are looking forward with some apprehension to the result. It has been said to me by prominent citizens of the island that the people are not yet educated enough in the practice of self-government to understand and appreciate the dignity of participating in this way in the administration of justice. (Vol. 1, Opp. Atty. Gen. of Porto Rico, pp. 246, 247.)

Report to the Governor of Porto Rico, dated August 1, 1902.

The first statute enacted by the legislative assembly of Porto Rico at its first session established the

right of the accused to demand a trial by jury in cases involving a punishment for a period of two years or more. * * * Although a change in the criminal law so radical as this attracted much attention and was the subject of much comment by the press of the island, it was some months before any defendant accused of crime availed himself of the right to have a jury of his peers pass upon the question of his guilt. And, although the act has been in operation for nearly a year and a half, there has been no demand for such a trial by any defendant charged with crime in the district court of San Juan, the most important trial court of the island. In the other four trial courts there have been in the aggregate but twenty-four jury trials to this date. I do not feel, therefore, that the law has been sufficiently tested to enable me to form any judgment as to whether the enactment was premature and as to whether the right to demand a jury trial will be an efficient aid in the administration of the criminal laws. * * *

It is to be said for the system of submitting the issues in a criminal case to three trained jurists, heretofore and now prevailing when the person accused does not demand a trial by jury, that a judgment of guilty is almost certain to be in accordance with the facts. I have been impressed with this from the examination of the applications to you for pardon. * * * It is very seldom that such an application fails to contain in some form an admission of guilt by the petitioner, and when the claim of innocence is made a study of the case rarely fails to reveal the fact that it is of a frivolous nature and without foundation. Guilty men may occasionally escape just punishment in Porto Rico, but I have been compelled to the conclusion that the punishment of innocent men by a court of three

judges has rarely happened since the establishment of civil government in the islands. (Id., 256, 257.)

Report to the Attorney-General of the United States, dated November 1, 1902.

Although during the year ending on September 30, 1902, the district courts of the island disposed of 3,183 criminal matters of all kinds, in a large number of which the persons accused had the right under the law to demand a jury trial, but 17 such trials were heard. * * * But lately there has been manifested in the jurisdiction of the district court of Mayaguez a growing desire on the part of persons charged with crime and on the part of their attorneys to make use of the privilege thus accorded by law. This is indicated by the fact that in that court during the month of October following the period of one year covered by this report 30 jury cases were heard. This exceeds the entire number of such trials throughout the island in all the courts since the jury-procedure act went into effect. Of the 30 trials only 11 resulted in convictions. And in the total number of 47 jury cases tried since the jury-procedure act went into effect there have been but 18 verdicts of guilty. The details as to the nature of the cases and the evidence adduced are wanting, but the percentage of acquittals is large and is suggestive as the possible explanation of the sudden popularity of the jury-procedure act in that jurisdiction. But I see no just occasion for apprehension at this time. The number of trials is so small as, in my judgment, not to constitute a sufficient test of the efficacy of the jury system as an instrument of justice in this island. (Id., 271, 272.)

Report to the governor of Porto Rico, dated October 1, 1903 (Third Annual Report of the Governor of Porto Rico, pp. 80–83).

It is useless to disguise the fact that results following the adoption of the jury system have been very disappointing to its friends in Porto Rico. * * * On this island the people were not ready for the jury system; many do not care for it. * * *

The obstacle to an immediately successful application of the jury system lies in the political training of the people. * * *

The change is not yet understood; and besides, people are slow to abandon well-established customs for those with which they are not familiar.

It is urged by some that the lawyers themselves are the most serious obstacles in the way of jury trials; that, being familiar with the old code, and acquainted with the practice under it, and not having had any experience in trying cases before a jury, they prefer to adhere to the familiar methods, and hence discourage jury trials except for political offenses. It is even contended that the old judges reach for the code with which they are so familiar when emergencies arise. * * *

But while the advent of the jury system was premature, yet, as far as any act of Porto Rico is concerned, in my judgment it has come to stay. I would not advocate its withdrawal without further trial. Upon the whole I think jury trials are increasing. Sixty cases were set for trial at the Mayaguez September term. But at Ponce out of 107 felony cases since July 1, 1903, only 9 called for a jury. It is now limited to the trial of criminal cases in which the offense charged is a felony, and in no case may the right be invoked in a civil cause.

(M) Criminal proceedings in the Philippines under Spanish law.

[See Exhibits A, B, C, D, and E for provisions of Roman, French, and Spanish law as to jeopardy.]

The following laws contain important provisions relating to criminal proceedings in the Philippines:

> The reglamento for the administration of justice, September 26, 1835: Spanish text, Zamora, IV, 102; Alcubilla, VII, 513; not translated.
>
> The royal cedula of January 30, 1855: Spanish text, Berriz, 1888, I, 804; not translated.
>
> The provisional law of criminal procedure, extended to the Philippines by royal decree of September 4, 1884, carried into effect by royal order of December 17, 1886: Spanish text of law, Berriz, 1888, I, 1182; of decree and order, Alcubilla, II, 1017; not translated.
>
> The compilation of organic provisions for the administration of justice in the Spanish colonies, January 5, 1891: Spanish text, Berriz, 1891, p. 383; translated in War Department.

The reglamento of 1835 bears internal evidence that it extended to the Philippines. For example, in articles 26 and 29 it is provided that certain fines shall be doubled in the colonies; and article 61, which provides for the division of audiencias or superior courts into civil and criminal branches, mentions specifically the audiencias of Cuba, Porto Rico, and the Philippines. Moreover, this reglamento is included in Señor Zamora's "Library of Colonial Law," which received the official sanction of the Spanish crown in 1847. (See Zamora, VI.)

Señor Alcubilla speaks of the reglamento as the ancient organic law of Spanish courts and procedure.

The most important provisions of this organic law, so far as it concerns criminal procedure, are in substance as follows:

Article 31 provides that the alcalde, or mayor, in each town shall, concurrently with the judge of first instance, if there be one in the town, have jurisdiction to try in oral trial petty offenses (*faltas livianas*) which involve no punishment except censure or slight correction.

Article 36 provides that the judges of first instance who are lawyers (letrados) shall have exclusive jurisdiction in their respective districts to hear in first instance all criminal causes belonging to the ordinary jurisdiction (i. e., not ecclesiastical or military).

Article 51 prescribes the procedure in criminal cases in the court of first instance, and consists of fifteen paragraphs.

Paragraph 1 contains an admonition to the judges not to deprive the accused of any protection or privilege which the law allows.

Paragraphs 2 and 3 provide for the "sumario," or preliminary investigation, which shall include the taking of evidence as to the *corpus delicti* and the connection of the accused therewith.

Paragraph 4 provides that at any stage when the innocence of the accused becomes apparent the proceedings shall be quashed, but that the order of quashal shall always be sent up to the audiencia for review (*en consulta*).

Paragraphs 5 to 13 provide for the proceedings in the "plenario" or trial proper, including the written pleadings of both parties, the review of the evidence introduced in the sumario, if contested, the introduction of new evidence, the making up of the record, and the pronouncing of judgment by the court.

Paragraph 14 is as follows:

> Notice of the final judgment shall be given to the parties immediately, and, *whether they appeal or not*, the original record shall be at once sent up to the audiencia of the province, after citation and summons of the parties, provided the cause be for a crime for which the law prescribes a corporal penalty. If the cause be for a petty crime, for which the law does not impose a penalty of this class, the record shall only be sent up to the audiencia, with equal formality, when *any one of the parties* interposes an appeal within two days after notice of the judgment; if an appeal is not taken within said time execution shall issue and the judgment shall be duly carried into effect by the judge.

(See Exhibit F for Spanish text and note.)

The succeeding chapter of the law relates to audiencias, and article 58 provides that the audiencias shall have jurisdiction

> To hear in second instance, and also in third when the law permits, the civil and criminal causes which the judges of first instance of their district send up on appeal or for review (in *consulta*) in accordance with the fourth and fourteenth paragraphs of article 51. (See above.)

Article 72 prescribes the procedure upon appeal or consulta, which includes an oral argument by the fiscal and the attorneys for the accused. This hearing is called the "*vista*." If the decision upon the vista is identical with that in first instance, no further hearing can be had; but if there is a difference in any particular, there might be a third hearing or "*revista*." (This *revista* was afterwards abolished. See below.)

Article 75 provides that at least five judges must sit in second and third instance (vista and revista) in cases of crimes punished by corporal punishment, and that

three must agree in every particular in order to pronounce judgment.

Article 86 provides that when the audiencia are in doubt as to the law of a case, they may apply to the supreme court at Madrid for advice.

The royal cedula of 1855 was framed expressly for Cuba, Porto Rico, and the Philippines (article 246), and, so far as inconsistent with the provisions of the reglamento of 1835, it superseded them (article 247). No change of importance was made, however, in regard to the hearing of criminal causes in first instance (article 20), and since there is nothing in the cedula to take the place of the fourteenth paragraph of article 51 of the reglamento, and nothing inconsistent therewith, the provisions of said paragraph must be regarded as continuing in force. Article 51 of the cedula (paragraph 8) provides that audiencias shall have jurisdiction to hear in second instance civil and criminal cases which the judges of first instance send up on appeal or in *consulta*, thus indicating that criminal causes still went up, as of course, according to the law of 1835.

Señor Ocaña, in his introductory note to the compilation of 1891, page 6, states that the cedula of 1855 ceased to be in force, first in Cuba and Porto Rico and afterwards in the Philippines. This statement is not strictly accurate. In 1879 the Penal Code of Spain and a provisional law for its application were extended to Cuba and Porto Rico, and in 1886 like action was taken with regard to the Philippines But, while these provisional laws covered much of the same ground as the cedula of 1855, they did not repeal that law except in so far as they were inconsistent therewith. Article 95 of the provisional law for the Philippines expressly provides that the laws and orders as to procedure, then

in force in the Philippines, should be repealed only so far as inconsistent with the provisions of said law of 1886.

It is certain that the cedula of 1850 was in force at the time this provisional law of 1886 was promulgated. (See Alcubilla, V, 247.)

The reglamento of 1835 and the cedula of 1855, therefore, continued in force after 1886, except so far as they were inconsistent with the Provisional Law of 1886. And this is a particularly important fact in view of the incompleteness of said law of 1886.

This law consists of ninety-five articles. Articles 1 to 26 provide for the trial of misdemeanors (*faltas*) by justices of the peace, with right of appeal to the court of first instance; articles 27 to 30 define the right to arrest for crime; article 31 provides that within twenty-four hours after a person has been arrested and brought before a court of first instance he must be either committed or discharged; articles 32 to 45 relate to commitment, bail, and treatment of prisoners; article 46 provides that the accused shall be released from custody when his innocence becomes manifest; article 47 provides that orders of commitment (*autos de prision*) shall be appealable to the superior court.

At this point we might expect to find a repetition or amendment of the law as to the trial in the court of first instance and the appeal or certification in *consulta* to the audiencia, but the Provisional Law is silent upon this subject. Article 48 goes on to say that one of the judges of the audiencia shall, in every case, serve as "ponente" (to receive the report of the "relator," or officer who investigates the law, compare said report with the record, and lay the case before the other judges); article 49 limits the cases in which five judges are required to sit (see article 75 of the Reglamento of 1835); article 50 declares that judgment must be pro-

nounced within five days after the *vista;* article 51 prescribes the form in which judgment must be rendered; article 52 prescribes the different kinds of proof which are sufficient to support a judgment of guilty; article 53 provides that from interlocutory orders of the audiencias a petition for a rehearing shall lie, but from final judgments there shall be no appeal except in cassation to the supreme court at Madrid.

This is the most important change made by the Provisional Law. The laws of 1835 and 1855 both permitted a "*suplica*" or petition for rehearing from the judgment in second instance, and there was no appeal in cassation in criminal causes. (See art. 198, Ced., 1855.) Under the Provisional Law the judgment in second instance became final, subject only to the appeal in cassation, similar to a writ of error.

Articles 54 to 79 of the Provisional Law treat of the appeal in cassation, and according to article 63 this appeal might be taken by the prosecution as well as by the defense. Articles 80–94 relate to certain temporary proceedings, costs, and rules of interpretation. The last article (95) repeals the laws or orders concerning procedure in force in the Philippines at that time, so far as inconsistent with the provisions of the Provisional Law, and provides that the laws of procedure in force in the Peninsula shall accompany this law and be applied in a supplementary character as doctrine worthy to be considered.

It is apparent therefore that this provisional law of procedure was merely an amendment to the existing laws, designed to meet the exigencies of a new substantive law of crimes, the Penal Code; that it did not purport to be a comprehensive code of procedure, and that the fundamental provisions in regard to the

trial of causes in first and second instance remained unchanged.

This fact is illustrated by the comment of Señor Ocaña as to the change in procedure in Cuba and Porto Rico in 1888. He says:

> The important royal decree of October 26, 1888, the main object of which was the organization of the courts of Cuba and Puerto Rico for the cognizance of criminal causes in oral and public trial and in single instance, introduced conspicuous changes in the organization of the courts of our Antilles. * * * This most important reform, inspired by a commendable intention to extend to the colonial provinces the oral and public trial with single instance before a collegiate court, different from the secret examination system * * * could not have been extended to the Philippines, because the backwardness of culture in these islands, the difference in language of their inhabitants, their lack of clear notions concerning public duties and those of citizenship, rendered impossible for the present the application of a system based on publicity of evidence and liability manfully accepted and understood beforehand, coupled with the duty to assist the administration of justice at any cost and without restrictions.

Speaking of the Compilation of 1891, to which his remarks are a preface, Señor Ocaña further says:

> The *promotores fiscales* (public prosecutors in the lower courts) and the present organization of the courts of first instance and of the justices of the peace in the Philippines are retained, as oral trial and the single instance for criminal matters, now in force in Spain, Cuba, and Porto Rico, could not as yet be extended to those islands, for reasons apparent to all.

Turning to the law of criminal procedure of Cuba and Porto Rico (Alcubilla, V, 66, 245) and the royal decree of October 26, 1888, reorganizing the courts of those islands (Berriz, 1888, I, 1201), we find that under the system of oral and public trials in single instance the function of the judge of first instance in criminal trials became that of a judge of "*instrucción*" (*juge d'instruction*), or merely an examining magistrate, whose duties ceased with the *sumario*. (See article 622 of the code and article 10 of the decree.)

This accounts for the provisions in articles 185 and 186 of the compilation of 1891, that judges of "*instruccion*" and first instance "shall have the power * * * in criminal matters, to conduct the *sumarios* in the causes and to institute the other proceedings referred to them by audiencias," and that criminal chambers and audiencias shall have jurisdiction to try "all the causes for crimes committed within their respective provinces." This language is plainly compatible only with the proceedings under the new law of procedure, and can have no reference to the Philippines. This is made clearer by article 22 of the compilation, which provides that—

> the actual organization of inferior courts of first instance and of courts of justices of the peace in the Philippine Islands shall be preserved until the law of criminal procedure in force in the peninsula and in the islands of Cuba and Puerto Rico is extended to the Philippines.

The law of 1891 was merely a compilation of existing laws applicable to the colonies, and the provision that judges of first instance, in general, should have power to conduct the *sumario* in criminal causes did not operate to deprive those judges in the Philippines of their jurisdiction to try a case, both in *sumario* and *plenario*, to judgment.

It appears from the foregoing that at the time of the American occupation of the Philippines the trial of serious crimes consisted of two stages—the hearing in first instance, and the "*vista*," or review, in second instance;

That the hearing in first instance, consisting of the "*sumario*" and "*plenario*," was held before the judge of first instance, who pronounced judgment in the case;

That *in every case* involving a serious crime, the record and judgment went up to the superior court or audiencia as a matter of course, in *consulta;*

That the audiencia conducted the *vista* or rehearing, and pronounced final judgment, upon which execution issued and from which there was no recourse except that of cassation.

That the appeal in cassation for matter of law lay to the supreme court at Madrid, and was allowed to the state as well as to the defense.

EXHIBIT A.

Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest. Si tamen ex eodem facto plurima crimina nascuntur, et de uno crimine in accusationem fuerit deductus, de altero non prohibetur ab alio deferri. (Cod. lib. ix, tit. ii, 1, 9.)

EXHIBIT B.

Toute personne acquittée legalement ne pourra plus être reprise ni accusée à raison du même fait. (Code d'inst. crim., art. 360.)

EXHIBIT C.

Despues que algun home acusado de algun mal fecho fuere dado por quito por Juicio, ninguno no le pueda despues acusar de aquel fecho mesmo. (Fuero Real, lib. iv, tit. xxi, 1, 13.)

EXHIBIT D.

Quito seyendo algunt home por sentencia valedera de algunt yerro sobre que lo hobiesen acusado, dende adelante non lo podrie otro ninguno acusar sobre aquel yerro. (Siete Partidas, Part. III, tit. 1, ley 12.)

EXHIBIT E.

Es otra de las escepciones generales, que no pueda ser acusado el que habiéndolo sido por el mismo delito, fué juzgado por él; por cuanto el efecto mas esencial de todas las declaraciones judiciales ejecutoriadas es, constituir un derecho inalterable. (Arrazola, tomo 1, pag. 511.)

EXHIBIT F.

La sentencia definitiva será notificada á estas (partes) inmediatamente, ó apelen ó no, se remitirán desde luego los autos originales á la audiencia del territorio con previa citación y emplazamiento de las mismas, siempre que la causa fuere sobre delito á que por la ley esté señalada pena corporal. Si la causa fuere sobre delito liviano á que por la ley no se imponga pena de esta clase, sólo se remitirá á la audiencia con igual formalidad cuando alguna de las partes interponga apelación dentro de los dos días siguientes al de la notificación de la sentencia; la cual causará ejecutoria, y será llevada desde luego á debido efecto por el juez, si no se apelare en dicho término. (Reglamento, 1835, art. 51, para. 14.)

NOTE.—"Sentencia" does not mean sentence, but judgment, or, as Don Vicente Salvá defines it in his dictionary, "the declaration of the judgment and decision of the judge upon the merits of the case." It would thus include a judgment of acquittal as well as

of conviction. The provision above quoted is illustrated by article 852 of the Compilation of Criminal Procedure of 1879 (Berris, app., vol. 1 and 2, p. 193), which superseded the Reglamento of 1835 in the Peninsula, but was never extended to the colonies. The provision mentioned, following after various rules as to pronouncing judgment in the court of first instance, declares that—

> *In all cases* the judge shall order the cause to be certified to the audiencia in consulta, and the parties to be cited and summoned, in order that they may make use of their right (to appear in the audiencia) within the time allotted them.

(**N.**) [Note *d*, p. 10 of Brief.]

The *reglamento* of September 26, 1835, speaks in terms of the Philippines and other Spanish colonies, and is included in Zamora's officially approved collection of laws applicable to the colonies. Many of the provisions of the *reglamento* have been superseded by subsequent laws, but the *reglamento* itself has never been repealed, and its provisions as to the course of appeal in criminal cases constituted the law in force upon that subject at the time of the American occupation (Opinion of Chief Justice Arellano and Solicitor-General Araneta, cablegram of March 20, 1904, *infra*). The *cedula* of 1855, the provisional law of 1884, and the compilation of 1891 were in terms applicable to the colonies. Each of these laws contains a provision that prior laws shall be repealed only so far as inconsistent with the later enactment.

(O) Translation of cablegram received from Philippine government at 8.43 a. m., March 20, 1904.

SECRETARY OF WAR, *Washington:*

With reference to your telegram of 15th, Araneta and Arellano agree that article 51, Reglamento, September 26, 1835, in force here at the date of American occupation. See pages 11, 28, and 34, volume 6, San Pedro's Legislación Ultramarina.

Article 58 of said Reglamento gives audiencia power to try second and third instance civil and criminal cases sent from courts of the first instance on appeal or for consultation. This is further authorized by No. 8, of article 51 of Royal Order of January 30, 1855.

All these provisions in force here at the time of American occupation from paragraph 14, article 51, and from article 58 of said Reglamento and from No. 8, article 51, order of January 30, 1855. Prosecuting attorney was one of the parties to a public criminal action and could appeal from judgment of acquittal. Such appeal was always allowed. Article 166, Royal Order January 30, 1855, expressly authorized such appeal.

WRIGHT.

(P) General Orders, Office of the United States military governor in the Philippine Islands.

General Orders, No. 20, Manila, P. I., May 29, 1899.

* * * * *

II. The supreme court of the Philippine Islands (audiencia territorial), heretofore administered in the city of Manila, the exercise of whose jurisdiction has been suspended as to criminal affairs since August 13, 1898, and as to civil affairs since January 30, 1899, is hereby reestablished, and will exercise the jurisdiction,

civil and criminal, which it possessed prior to August 13, 1898, in so far as compatible with the supremacy of the United States in said islands, and will administer the laws recognized as continuing in force by proclamation from these headquarters dated August 14, 1898, except in so far as they have been, or may hereafter be, modified by authority of the United States.

* * * * *

General Orders, No. 21. Manila, P. I., June 5, 1899.

The courts of first instance of the province of Manila, and the courts of the peace, heretofore held in the city of Manila, P. I., are hereby reestablished and will exercise the jurisdiction, civil and criminal, possessed by them prior to August 13, 1898, in so far as compatible with the supremacy of the United States in the Philippine Islands and the exercise of military government therein, and will administer the laws recognized as continuing in force by proclamation from these headquarters dated August 14, 1898, except in so far as these laws have been, or hereafter may be, modified by authority of the United States.

* * * * *

General Orders, No. 22. Manila, P. I., June 17, 1899.

I. The supreme court of the Phillippine Islands and the courts of first instance and of the peace for the province of Manila, reestablished in General Orders, Nos. 20 and 21, c. s., this office, are announced as open and in the exercise of their jurisdiction, civil and criminal, on and after Wednesday, June 21, 1899. * * *

(Q) Extract from debates in Congress on the Philippine civil government bill (Congressional Record, Fifty-seventh Congress, first session, p. 6082).

Mr. PETTUS. I desire to ask the Senator in charge of the bill if it would not be better to put into that amendment a provision securing the right of trial by jury.

Mr. LODGE. That amendment embodies the instructions to the Commission issued by President McKinley, and which are confirmed by the bill as it stands. The committee thought it better to put them in explicitly in words.

The right to bear arms and the right of trial by jury were omitted deliberately by the committee—the right to bear arms, owing to the disturbed condition that exists in the islands, and the right of trial by jury, because the committee were satisfied, on the testimony of Governor Taft and others, that the time had not yet come to compel the Commission to grant that. They have gone so far as to provide for what is known as assessors to sit with the judges. Governor Taft thought it was unwise, and he satisfied the majority of the committee of the fact that it was unwise to go further at this time. Those two provisions were omitted from President McKinley's instructions, and the majority of the committee thought it best not to embody them with the rest of the bill of rights.

[MEM.—It seems proper to refer to these debates, because no one doubts that Congress did not extend the jury guarantees, and the debates merely serve to show for what reasons those guarantees were withheld.]

O

Supreme Court of the United States.

Nos. 244 and 584.—October Term, 1903.

Thomas E. Kepner, Plaintiff in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Day delivered the opinion of the Court.

Thomas E. Kepner, a practicing lawyer in the city of Manila, Philippine Islands, was charged with a violation of the law in the embezzlement of the funds of his client, (*estafa.*) Upon trial, in November, 1901, in the court of of first instance, without a jury, he was acquitted, it being the judgment of the court that he was not guilty of the offence charged. Upon appellate proceedings by the United States to the Supreme Court of the Philippine Islands the judgment of the court of first instance, finding the accused not guilty, was reversed, and Kepner was found guilty and sentenced to a term of imprisonment of one year, eight months and twenty-one days, suspended from any public office or place of trust and deprived of the right of suffrage.

Error was assigned in the appellate court upon the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against putting a person twice in jeopardy for the same offence, and contrary to the Constitution of the United States.

The appeal was taken by the United States on December 20, 1901. A motion to dismiss the appeal was made on January 1, 1902. The motion was finally overruled on October 11, 1902; the final decision in the case, finding the accused guilty and imposing the sentence, was rendered on December 3, 1902.

A proper consideration of the question herein made renders it necessary to notice some of the steps by which the jurisdiction of the courts in which the accused was tried was established.

The United States acquired the Philippine Islands by cession under the treaty of peace executed at Paris, between the United States and Spain, on December 10, 1898, the final ratifications being exchanged April 11, 1899.

The islands after American occupation had been under military rule prior to the creation of the Philippine Commission.

Under the control of the military government, orders had been issued, among others, military order number 58, dated April 23, 1900, which order was in part as follows:

"General Orders, No. 58.

Manila, P. I., April 23, 1900.

"In the interests of justice and to safeguard the civil liberties of the inhabitants of these islands, the criminal code of procedure now in force

therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:

* * * * * *

"SEC. 3. All public offences triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

* * * * * *

Rights of accused at the trial.

"SEC. 15. In all criminal prosecutions the defendant shall be entitled:

"1. To appear and defend in person and by counsel at every stage of the proceedings.

"2. To be informed of the nature and cause of the accusation.

"3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.

"4. To be exempt from testifying against himself.

"5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answers in the presence of the accused or his counsel, the defence having had an opportunity to cross-examine the witness, the deposition of the latter may be read, upon satisfactory proof to the court that he is dead or insane, or cannot with due diligence be found in the islands.

"6. To have compulsory process issue for obtaining witnesses in his own favor.

"7. To have a speedy and public trial.

"8. To have the right of appeal in all cases.

* * * * * *

"SEC. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts an appeal may be taken to the Supreme Court as hereinafter prescribed. . . .

"SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

* * * * * *

"SEC. 50. It shall not be necessary to forward to the Supreme Court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos, exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had. The record in cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the Supreme Court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 1250 pesos

or in which an appeal shall have been taken, shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law. Cases forwarded to the Supreme Court involving sentences less serious than those hereinbefore last mentioned, and not appealed, shall be referred by the clerk to the ministerio fiscal for consideration, and if the latter return the same concurring in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the ministerio fiscal shall not concur in the sentence the case shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law when that officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the court, without the necessity of a further defence or hearing, when that officer recommends a lighter sentence."

This order was amended by an act of the commission (No. 194), passed August 10, 1901, and is as follows:

"(G) No. 194. An act conferring jurisdiction on justices of the peace, &c.

"SEC. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance. . . .

"SEC. 4. So much of section fifty of said general order number fifty-eight as requires courts of first instance, or clerks thereof, to forward to the Supreme Court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such court of first instance, is hereby repealed, and it shall not be necessary to forward to the Supreme Court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the Supreme Court for investigation and judgment, as law and justice shall dictate."

Courts were established for the islands under an act passed by the commission June 11, 1901:

"SEC. 2. The judicial power of the government of the Philippine Islands shall be vested in a Supreme Court, courts of first instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record.

* * * * * *

"SEC. 16. The jurisdiction of the Supreme Court shall be of two kinds:

"1. Original: and

"2. Appellate.

"SEC. 17. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, *habeas corpus* and *quo warranto* in the cases and in the manner prescribed in the Code of Civil Procedure,

and to hear and determine the controversies thus brought before it, and in other cases provided by law.

"SEC. 18. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court.

"SEC. 19. The Supreme Court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

* * * * * *

"SEC. 39. The existing audiencia or Supreme Court is hereby abolished, and the Supreme Court provided by this act is substituted in place thereof.

* * * * * *

"SEC. 55. The jurisdiction of courts of first instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"SEC. 56. Courts of first instance shall have original jurisdiction. . . . 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * * *

"SEC. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

"SEC. 66. There shall be courts of justice of the peace as in this section provided:

"1. The existing courts of justices of the peace, established by military orders since the thirteenth day of August, eighteen hundred and ninety-eight, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the commission.

"2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justice of the peace shall be established in every municipality thereof which shall be organized under the municipal code, or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of the municipal code.

* * * * * *

"SEC. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offences arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of one hundred dollars; . . . ."

On July 1, 1902, Congress passed an act (32 Stat. 691):

"Act of Congress of July 1, 1902, 'temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes.'

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set

forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice governor of the Philippine Islands, and authorizing said civil governor and vice governor to exercise the powers of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled 'An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction,' enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: 'By authority of the United States be it enacted by the Philippine Commission.' The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

"Future appointments of civil governor, vice governor, members of said commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

* * * * * * *

"SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws.

"That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offence without due process of law; and no person for the same offence shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to testify against himself.

"That all persons shall before conviction be bailable by sufficient sureties, except for capital offences.

"That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion, insurrection or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist.

"That no *ex post facto* law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office or title of any kind whatever from any king, queen, prince or foreign State.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

"That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

"That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

* * * * * *

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the Supreme Court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the Supreme Court and courts of first instance shall not be changed except by act of Congress.

"SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified or affirmed

by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States."

The act just quoted became a law before the final conviction of the accused in the Supreme Court of the islands.

It is contended by the Government that that part of the law under immediate consideration, which provides that no person, for the same offence, shall be twice put in jeopardy, must be construed in view of the system of laws prevailing in the islands before the same were ceded to the United States, and that the purpose of Congress was to make effectual the jurisprudence of the islands as known and established before American occupation, and that the provision against double jeopardy must be read in the light of the understanding of that expression in the civil law, or rather the Spanish law as it was then in force.

The citations in the brief of the learned counsel for the Government seem to establish that under the Spanish law, as theretofore administered, one who had been convicted by a judgment of the court of last resort could not again be prosecuted for the same offence. We notice some of these provisions:

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255) and the Siete Partidas (A. D. 1263).

"After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence (except in certain specified cases). Fuero Real, lib. iv, tit. xxi, l, 13.

"If a man is acquitted by a valid judgment of any offence of which he has been accused, no other person can afterwards accuse him of the offence (except in certain cases). Siete Partidas, Part. VII, tit. i, l. xii."

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola in 1848, it is said, in considering the persons who may be accused of crime:

"It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the same crime, since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo I, pag. 511."

Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the audiencia, or Supreme Court, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in

due form of law. The change introduced under military order No. 58, as amended by act 194 of the commission, made the judgment of the court of first instance final, in cases other than capital, whether the accused be convicted or acquitted, unless an appeal was prosecuted by the Government or the accused in the manner pointed out.

In order to determine what Congress meant in the language used in the act under consideration, "No person for the same offence shall be twice put in jeopardy of punishment," we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed. A consideration of the events preceding this regulation makes evident the intention of Congress to carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction.

That it was the intention of the President in the instructions to the Philippine Commission to adopt a well-known part of the fundamental law of the United States, and to give much of the beneficent protection of the bill of rights to the people of the Philippine Islands, is not left to inference, for in his instructions, dated April 7, 1900, (see Public Laws and Resolutions of Philippine Com., 6–9,) he says:

"In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government;"

But he was careful to add:

"At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public

use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the Thirteenth Amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. (*The Abbotsford*, 98 U. S. 440.)

It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question. (*American Ins. Co.* v. *Canter*, 1 Pet. 511; *Murphy* v. *Ramsay*, 114 U. S. 15; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *Downs* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197.) This case does not call for a discussion of the limitations of such power, nor require determination of the question whether the jeopardy clause became the law of the islands after the ratification of the treaty without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted.

It is argued that in the act of July 1, 1902, Congress recognized the jurisdiction of the Philippine courts in section 9 as follows:

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the the government of said islands, subject to the power of said government to change the practice and method of procedure."

The argument is, that Congress intended to leave the right of appeal as provided by military order, No. 58, as amended by the commission, in full force.

But Congress, in section 5, had already specifically provided that no person should be put twice in jeopardy of punishment for the same offence. While section 9 recognizes the established jurisdiction of the courts of the islands, it was not intended to repeal the specific guaranty of section 5, which is direct legislation pertaining to the particular subject. It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. (*In re Rouse, Hazard & Co.*, 91 Fed. Rep. 97–100, and cases therein cited; *Townsend* v. *Little*, 109 U. S. 504, 512.)

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken. 1 Kent Com. 336. *United States* v. *Wong Kim Ark*, (169 U. S. 649,) in which this court said:

"In this, as in other respects, it [a constitutional provision] must be interpreted in the light of the common law, the principles and history of which were familarly known to the framers of the Constitution. (*Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 144 U. S. 417; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 624 U. S. 465.) The language, as has been well said, could not be understood without reference to the common law. (1 Kent. Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274.)"

At the common law, protection from second jeopardy for the same offence clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offence. The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *United States* v. *Gilbert et al.*, (2 Sumner, 39):

"The plea (says he) of *autre fois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."

In this court it was said by Mr. Justice Miller, in *Ex parte Lange*, (18 Wall. 163):

"The common law not only prohibited a second punishment for the same offence, but went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

And in as late a case as *Wemyss* v. *Hopkins*, (L. R. 10 Q. B. 378,) it was held that a conviction before a court of competent jurisdiction, even without a jury, was a bar to a second prosecution.

In that case the appellant had been summarily convicted before a magistrate for negligently and by wilful misconduct driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault. It was held that the first conviction was a bar to the second. In the course of the opinion it was said by Blackburn, J.:

"I think the fact that the appellant had been convicted by justices under one act of Parliament for what amounted to an assault is a bar to a conviction under another act of Parliament for the same assault. The defence does not arise on a plea of *autre fois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *Transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same

matter; otherwise there might be two different punishments for the same offence. The only point raised is whether a defence in the nature of a plea of *autre fois convict* would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury."

In the same case it was said by Lush., J.: "I am also of opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of two statutes. The appellant was prosecuted for the assault and convicted under one of the statutes, 3 and 4, Wm. IV, c. 50, s. 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute."

It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal. (*Coleman* v. *Tennessee*, 97 U. S. 509.) Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offence, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. (*People* v. *Miner*, 144 Ill. 308; *State* v. *Bowen*, 45 Minn. 145; *State* v. *Layne*, 96 Tenn. 668.)

In *United States* v. *Sanges*, (144 U. S. 310,) it was held that a writ of error did not lie in favor of the United States in a criminal case, Mr. Justice Gray said:

"From the time of Lord Hale to that of Chadwick's case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, sec. 12; c. 50, sec. 10 *et seq.*; Bac. Ab. Trial, L. 9, Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 179.

"But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

In the course of the opinion Justice Gray cites, among other cases, *Com.* v. *Commings* and *Same* v. *McGinnis*, opinion by Chief Justice Shaw, (3 Cush. 212.) In Archbold Cr. Pl. & Pr., Pomeroy's ed., 199, it was said: "There is no instance of error being brought upon a judgment for a defendant after an acquittal."

That the learned justice could not have intended to intimate that a second prosecution could be allowed by statute after an acquittal of the offence is shown by the subsequent decision of this court in *United States* v. *Ball*, (163 U. S. 662,) in which Mr. Justice Gray also delivered the opinion of the court. In that case an attempt was made to prosecute for the second time one Millard F. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others jointly indicted with Millard F. Ball, who had been convicted at the trial. The court below held Ball's plea of former jeopardy to be bad. But this court reversed the judgment, and in the course of the opinion it was said:

"The Constitution of the United States, in the Fifth Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence. (*Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. c. 35, sec. 3; 1 Bishop's Crim. Law, sec. 1028.) But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so voided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. (*Ex parte Parks*, 93 U. S. 18.) If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. (*United States* v. *Sanges*, 144 U. S. 310.) But the fact that a judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case. . . . *As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeop-*

pardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by judgment, is a bar to a subsequent prosecution for the same offence. (*United States* v. *Sanges*, 144 U. S. 310; *Commonwealth* v. *Tuck*, 20 Pick. 356, 365; *West* v. *State*, 2 Zabriskie, [22 N. J. Law] 212, 231; 1 Lead. Crim. Cas. 532.)"

It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offence.

We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. (*People* v. *Webb*, 38 Cal. 467.) Mr. Bishop, in his work upon Criminal Law, sums up the scope and authority of such statutes as follows:

"A legislative provision for the rehearing of criminal causes cannot be interpreted—or, at least, it cannot have force—to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. Such a statute will be interpreted with the Constitution, and be held to apply only to cases where it constitutionally may. And if it undertakes to give to the State the right of appeal, to retry the party charged, after acquittal, it is invalid. And so the writ of error, or the like, allowed to the State, can authorize the State to procure the reversal of erroneous proceedings and commence anew, only in those cases in which the first proceeding did not create legal jeopardy." (1 Bishop Criminal Law, fifth ed. sec. 1026.)

The author's conclusion has support in the case of *People* v. *Miner*, (144 Ill. 308, *supra*,) wherein a statute giving an appeal when the accused had been acquitted before a competent tribunal, was held in violation of section 10, article 2, of the constitution of that State, providing that no person shall be put twice in jeopardy for the same offence. So in the case of *People* v. *Webb*, (38 Cal. 467,) a statute undertaking to give the right of appeal to the people in criminal cases was held to be limited to the cases in which errors in the proceedings may occur before legal jeopardy has attached. In the course of a well-considered opinion it was said:

"The question thus presented is of most grave importance, and, so far as we are advised, has never been directly passed upon by this court, hence we have given it a most patient consideration, and after a careful exam-

ination of the authorities as to the construction of similar provisions in the constitutions of other States, and the Constitution of the United States, we are entirely satisfied that this court has no authority in criminal cases, under our State constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had once been put upon his trial for an alleged felony, upon a valid indictment before a competent tribunal and acquitted by the verdict of such jury; but we find a vast number of adjudications of the highest judicial tribunals of the different States and many of the Federal courts to the effect that no such retrial is allowed by the common law, and is directly interdicted by the Constitution of the United States, and also of most of the several States. The universal maxim of the common law of England, as Sir William Blackstone expresses it, '*that no man is to be brought into jeopardy of his life more than once for the same offence*,' is embraced in article V of amendments to the Constitution of the United States, and in the constitutions of several States, in the following language: '*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;*' and in many other States the same principle is incorporated in the organic law, in language the same as hereinbefore quoted from the constitution of this State. While the constitutions of some few States are destitute of this or any similar provision, other State constitutions, such as of New Hampshire, Rhode Island, New Jersey and Iowa, merely interdict a second trial for the same offence after acquittal."

The case of *State* v. *Lee*, (65 Conn. 265,) in the reasoning of the court seems opposed to this view. But no reference is made in the course of the opinion to any constitutional requirement in Connecticut as to double jeopardy. An examination of the constitution of that State and amendments as published in General Statutes of Connecticut Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none.

The exceptional character of the decision in *State* v. *Lee* is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. State Rep. 202, in the following language:

"This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy."

And further:

"The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it." (*People* v. *Corning*, 2 N. Y. 9; 49 Am. Dec. 364 and note; 48 Am. State Rep. 213–214.)

The Ball case (163 U. S. *supra*) establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The

court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offence, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well-settled sense as declared and settled by the decisions of this court.

It follows that military order No. 58, as amended by act of the Philippine Commission No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, was repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offence.

This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.

Judgment reversed and prisoner discharged.

No. 584.

Secundino Mendezona y Mendezona, Plaintiff in Error, *vs.* The United States.	In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice DAY delivered the opinion of the Court.

This case involves the question just decided in *Kepner* v. *United States.* The plaintiff in error was acquitted in the court of first instance and convicted in the Supreme Court of the Philippine Islands.

For the reasons stated in the Kepner case, the judgment herein is reversed, and the prisoner discharged.

Dissenting: Mr. Justice BROWN, Mr. Justice WHITE, Mr. Justice McKENNA and Mr. Justice HOLMES.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 244.—October Term, 1903.

Thomas E. Kepner, Plaintiff in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Brown dissenting.

Under our Anglo-Saxon system of jurisprudence I have always supposed that a verdict of acquittal upon a valid indictment terminated the jeopardy, that no further proceedings for a review could be taken either in the same or in an appellate court, and that it was extremely doubtful whether even Congress could constitutionally authorize such review.

Conceding all this, however, I think that in applying the principle to the Philippine Islands, Congress intended to use the words in the sense in which they had theretofore been understood in those Islands. By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the Audiencia or Supreme Court, until that body had acted upon the case. The proceedings before the court of first instance were in all important cases reviewable by the Supreme Court upon appeal, which acted finally upon the case and terminated the jeopardy. This was evidently the view of the military commander in General Order No. 58, and of the Philippine Commission in the act of August 10, 1901, (No. 194,) in both of which an appeal to the Supreme Court was contemplated, even after a judgment of acquittal. I think this also must have been the intention of Congress, particularly in view of sec. 9 of the Philippine act of July 1, 1902, which provided that "the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction *as heretofore provided* . . . subject to the power of said government to change the practice and modes of procedure." It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 244.—October Term, 1903.

Thomas E. Kepner, Plaintiff in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Holmes, with whom concurred Mr. Justice White and Mr. Justice McKenna, dissenting.

I regret that I am unable to agree with the decision of the majority of the Court. The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument. If, as is possible, the constitutional prohibition should be extended to misdemeanors, *Ex parte Lange*, 18 Wall. 163, 173, we shall have fastened upon the country a doctrine covering the whole criminal law, which, it seems to me, will have serious and evil consequences. At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt. It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree, *United States* v. *Perez*, 9 Wheat. 579; see *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263; *Thompson* v. *United States*, 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. *Hopt* v. *People*, 104 U. S. 631, 635, 110 U. S. 574, 114 U. S. 488, 492, 120 U. S. 430, 442; *United States* v. *Ball*, 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the

first is arrested upon motion. *Ex parte Lange*, 18 Wall. 163, 174; 1 Bish. Crim. Law, 5th Ed., § 998. I may refer further to the opinions of Kent and Curtis in *People* v. *Olcott*, 2 Johns. Cas. 301; *S. C.*, 2 Day, 507, n.; *United States* v. *Morris*, 1 Curtis, 23, and to the well-reasoned decision in *State* v. *Lee*, 65 Conn. 265.

If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah*, 170 U. S. 343, 353, 354. Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offence, so that the jeopardy only is continued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is what shall be done with the prisoner. Since at that moment he no longer is in jeopardy from the first verdict, if a second trial in the same case is a second jeopardy even as to the less offence, he has a right to go free. In view of these difficulties it has been argued that on principle he has that right if a mistake of law is committed at the first trial. 1 Bish. Crim. Law, 5th Ed., §§ 999, 1047. But even Mr. Bishop admits that the decisions are otherwise, and the point is settled in this Court by the cases cited above. That fetish happily being destroyed, the necessary alternative is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record, as when he is tried on a defective indictment, if judgment is not arrested. *United States* v. *Ball*, 163 U. S. 662. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I sub-

mit, is that there can be but one jeopardy in one case. I have seen no other, except the suggestion of waiver, and that I think cannot stand.

If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. The latter is every day practice, yet there is no doubt that the prisoner is in jeopardy at the trial before the magistrate, and that a conviction or acquittal not appealed from would be a bar to a second prosecution. That is what was decided, and it is all that was decided or intimated, relevant to this case, in *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378. For the reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below.

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